Biennial Report

of the

ATTORNEY GENERAL

of the

State of Colorado

Years 1927 and 1928

WILLIAM L. BOATRIGHT
Attorney General

THE BRADFORD-ROBINSON PTG. CO.
DENVER, COLORADO
1929

Biennial Report

of the

ATTORNEY GENERAL

of the

State of Colorado

Years 1927 and 1928

WILLIAM L. BOATRIGHT
Attorney General

THE BRADFORD-ROBINSON PTG. CO.
DENVER, COLORADO
1929

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
David 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
Fred Farrar	1913-1916
Leslie E. Hubbard	1917-1918
Victor E. Keyes	1919-1922
Russell W. Fleming	1923
Wayne C. Williams	1924
William L. Boatright	1925-1928

STATE OF COLORADO LEGAL DEPARTMENT

Attorney General

William L. Boatright

Deputy Attorney General

Charles Roach

Assistant Attorneys General

[1]S. E. Naugle
[2]Ralph L. Carr
Jean S. Breitenstein
Otto Friedrichs
A. L. Beardsley
William W. Gaunt

Special Assistant Attorneys General

John C. Vivian
Oliver Dean

Stenographic and Clerical Assistants

Miss Margaret E. Fallon
Miss Anna G. Landy
[3]Miss Emma Bortt
[4]Miss Blanche Holmes

INHERITANCE TAX BUREAU

Inheritance Tax Commissioner and Assistant Attorney General

Andrew H. Wood

Deputy Inheritance Tax Commissioners

A. M. Morris
O. S. Brinker
J. W. Klein

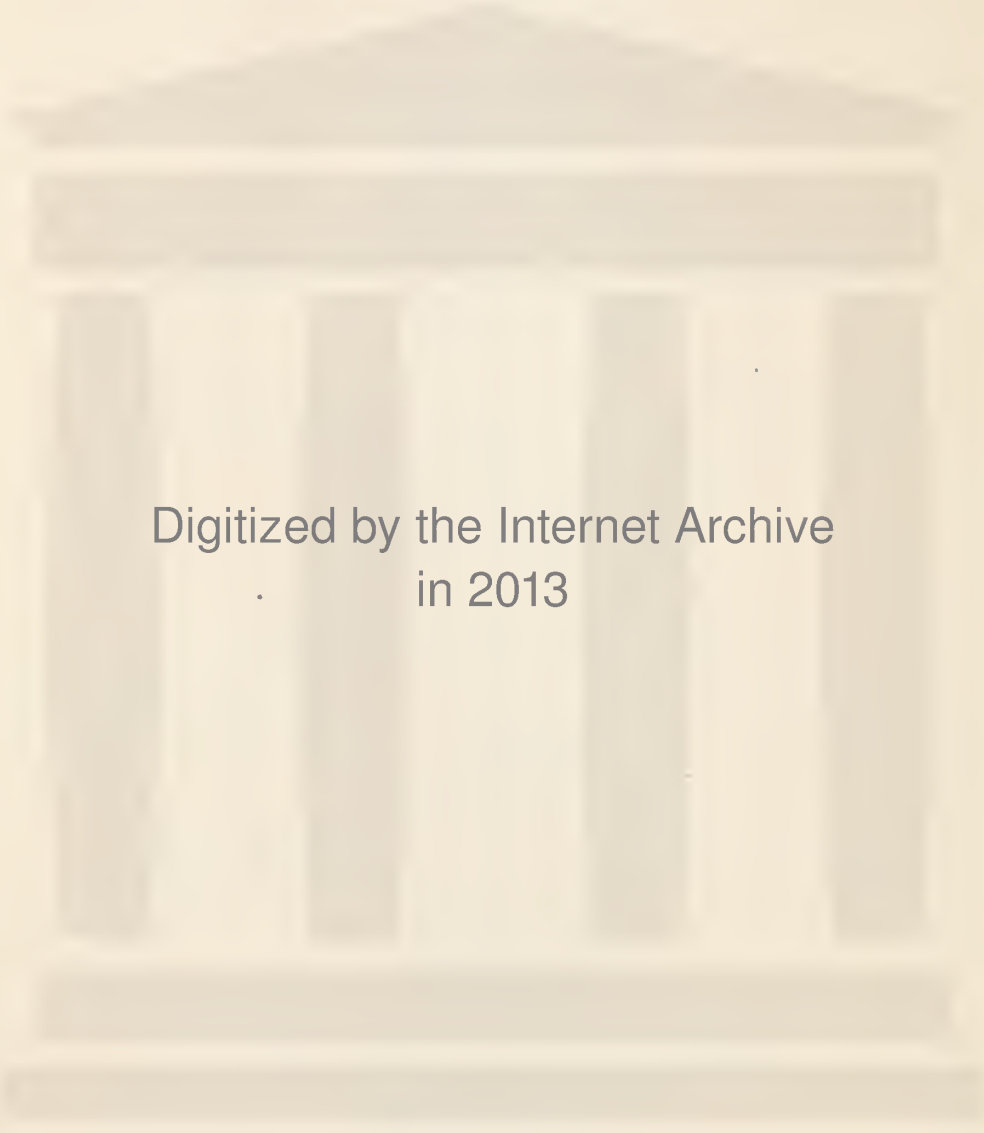
Inheritance Tax Appraisers

G. W. Moscript
Leland S. Boatright

Stenographic and Clerical Assistants

Mrs. Margaret Kranich
Mrs. M. L. Schneider
Mrs. Marie Powell

[1] Resigned February 15, 1927.
[2] Appointed March 4, 1927, to fill vacancy caused by resignation of S. E. Naugle.
[3] Transferred to Civil Service Commission.
[4] Appointed to fill vacancy caused by transfer of Miss Bortt.



BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

OF THE

STATE OF COLORADO

SCHEDULE I

To His Excellency,

WILLIAM H. ADAMS,
Governor of Colorado.

Dear Sir:

Pursuant to law, I submit to you herewith my report as Attorney General for the biennial term beginning January 11, 1927, and ending January 8, 1929. The same is submitted under three general headings:

1. Preliminary summary and report.
2. Cases disposed of and still pending in all courts, Federal and State.
3. Opinions rendered during the term.

The volume of business transacted in this department during the past biennial has shown an increase over that of the preceding period. The healthy growth and development of the State and the accompanying problems that arise in the various governmental departments naturally bring about such a result. The new problems growing out of the bus and truck transportation law and other recent statutes, have materially contributed thereto. I can see no likelihood of any noticeable reduction in the work of this department for the coming years, but rather expect to see a gradual increase in the burdens and responsibilities properly belonging to this department.

NEW MEXICO-COLORADO BOUNDARY

The work of re-establishing the Darling line as the true boundary between Colorado and New Mexico, as ordered by the Supreme Court of the United States, has been carried on by Mr. Arthur D. Kidder, cadastral engineer, and his assistants during a part of the summer and autumn of 1927 and all of the summer and

autumn of 1928, and is now about half completed. Expenses of this work have been paid by the two states in equal parts. I am advised by the State Auditor that the sum of $15,000.00 appropriated for these expenses by the Twenty-sixth General Assembly is nearly exhausted. It will, therefore, be necessary for the Twenty-seventh General Assembly to make another appropriation in order that this important work may be completed.

GASOLINE TAXES

The last General Assembly enacted a new gasoline excise tax law which raised the tax from two cents a gallon to three cents a gallon and otherwise differed materially from the former Act of 1919 as amended in 1923. Some litigation arose in reference to the new law, not all of which has been finally determined, but despite this litigation, the tax has been collected within a fraction of 100 per cent. Two cases are now pending in our Supreme Court, in which the constitutionality of the law is attacked. Decisions are expected in these cases early in 1929.

FREIGHT RATE MATTERS

During the biennial period, nearly one-half of the time of one assistant was given over to work intended to secure a fairer rate structure for Colorado shippers over the railroad systems of the country.

Under the provisions of the Hoch-Smith resolution, adopted by Congress in 1924, which requested the Interstate Commerce Commission to determine the lowest lawful rates, commensurate with good service, upon agricultural products, a series of investigations was commenced which is still continuing and which will probably take another year or so for completion. The rates upon grains, livestock, hay, and the western class rates generally, have been taken up under separate divisions.

An assistant from this office has attended hearings at Dallas, Texas; Chicago, Illinois; Kansas City, Missouri; Salt Lake City, Utah; St. Paul, Minn.; and Denver, Colorado. Briefs have been prepared and filed in those cases which have been completed, and a great deal of work has been done in connection with the presentation of evidence on behalf of Colorado.

In 1927 a signal victory was won for the potato growers of the State by securing a correction of certain rates from the Greeley district in a case which has been in progress for several years.

MOTOR BUS CASES

One of the most serious problems handled by the office during the two years has been in connection with the construction of the two motor vehicle license measures passed by the General Assembly.

Many attacks were made upon the constitutionality of House Bill No. 432, which sought to place an additional registration license fee upon motor vehicles used for hauling passengers and freight for hire. As a result of the efforts of this office, the Act was held by the Supreme Court to be constitutional, and while its provisions were considered not to be binding upon certain classes of vehicles, a large amount of money was collected for the use of the State.

House bill No. 430 provided, among other things, for the collection of mileage fees from those motor carriers using the public highways for hire which are classed as public utilities. Many interesting questions arose in connection with the interpretation of this statute, but no suits were brought to test its provisions.

DRAFTING OF BILLS

In the biennial report of this department for the years 1925-1926, the burden falling upon the department in the drafting of numberless bills for the members of the General Assembly and other citizens, was commented upon and the fact was noted that many of the states have established legislative reference bureaus to aid in the handling of this class of work.

The Twenty-sixth General Assembly enacted a comprehensive statute establishing such a bureau, but the act has never been put into effect. I believe that as soon as the finances of the State will justify the very moderate expenditure involved in the establishment of this bureau, it would be well worth while to put this statute into operation, and I believe that permanent results of a most beneficial character would follow.

INHERITANCE TAX

Through this department there has been collected during the last biennial period, the total sum of $1,544,093.08. The expense of collection for the same period amounts to the sum of $49,815.84, which is 3.2+ per cent of the amount collected. This expense total is exclusive of any incidental expenses for the last month, for which bills have not yet been presented.

The appropriation made by the last General Assembly for the expenses of the inheritance tax department for the period from July 4, 1927, when the present law went into effect, to the end of the biennium, exclusive of salaries, was $17,000. Of this appropriation we have expended $12,726.61, leaving a balance of $4,273.39 to be turned back into the general fund. There is also the sum of $2,486.41 to be turned back into the general fund as unexpended salaries appropriated by the last General Assembly for this department. This last item arises largely by reason of the fact that the General Assembly made an appropriation for a stenographer in place of which we employed a clerk as provided by the Inheritance

Tax Law, such clerk being paid from the said $17,000 appropriation with the approval of the State Auditing Board.

The refunds of taxes made under order of court and by requisitions approved by the State Auditing Board for the biennium amount to $2,436.75.

The collections for the biennial period may be tabulated as follows:

Number of Treasurer's Receipts issued on estates examined, being receipts numbered 37901 to 44962, both inclusive	7,062
Receipts issued on estates paying tax	1,196
Receipts issued on estates paying $1.00 waiver fee	4,038
Receipts issued on estates paying $3.00 waiver fee	108
Receipts issued on estates paying $5.00 waiver fee	1,627
Receipts issued on estates paying $10.00 waiver fee	77
Receipts issued on estates paying additional fees	16
Number of estates paying $10.00 examination fee, these being included in certain of the above-mentioned receipts	883

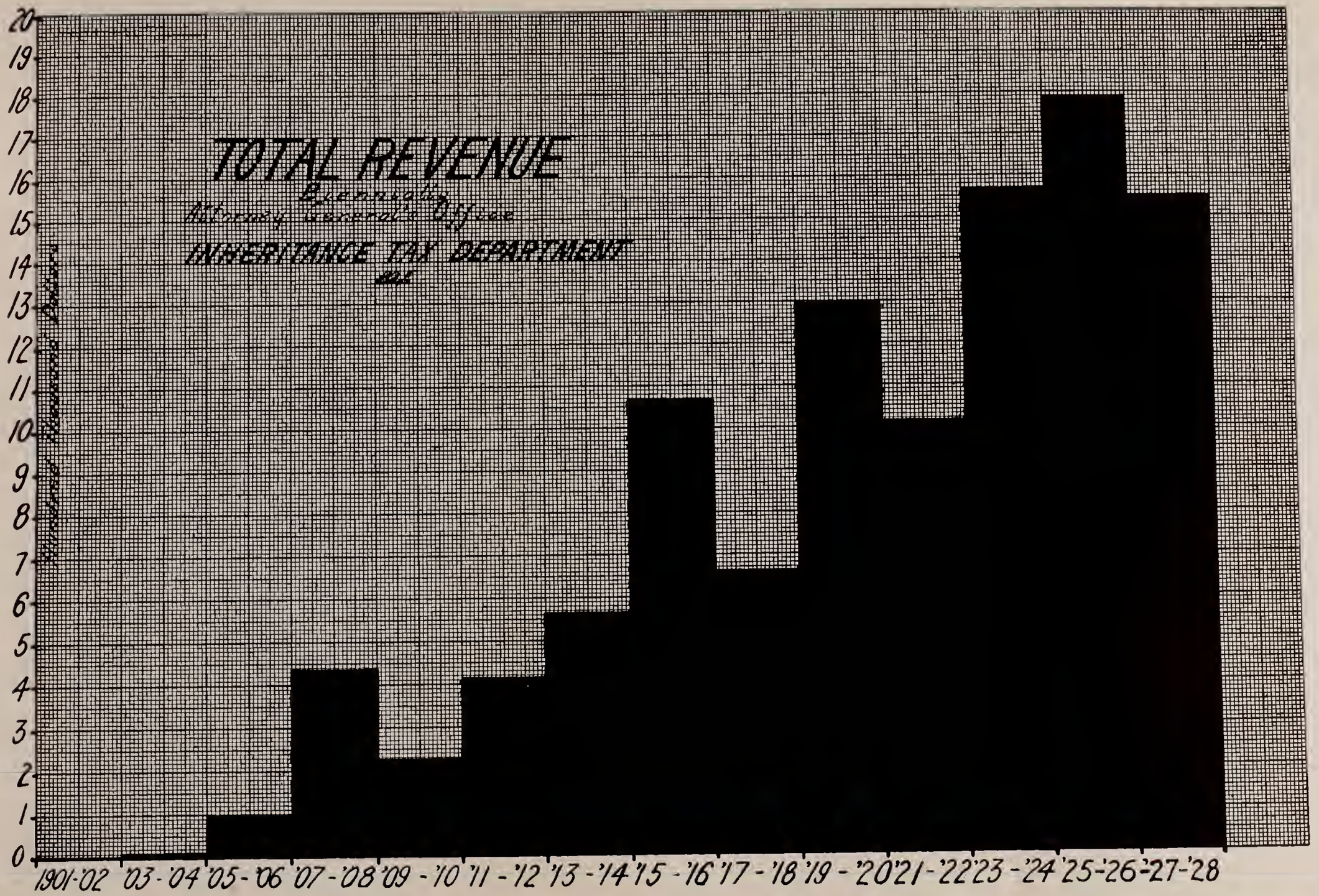
Attached hereto is a graphic comparison of inheritance taxes collected in each of the fourteen biennial periods since the first inheritance tax law went into effect.

The most important contested court case conducted in this department was docketed in the Supreme Court of the State of Colorado under the title: In the Matter of the Estate of John M. Waldron, deceased, Margaret I. Waldron, as Executrix, vs. the People of the State of Colorado, No. 11781. The decision in this case sustained an assessment of inheritance tax of $15,293.34 and interest, on said estate and affirmed the judgment of the District Court of Denver County.

INTERSTATE WATER RIGHTS

Interstate river problems have commanded the serious attention of this department during the past biennial period. The department has co-operated with the Interstate Rivers Commissioner and the Governor in all such matters, particularly with respect to the Colorado, Arkansas, Rio Grande, North Platte and La Plata rivers.

Colorado River problems have required close attention. Danger of Congressional authorization of the construction of a reservoir at Boulder Canon prior to a settlement of interstate water titles by approval of the Colorado River Compact, called for decisive action and prompt resistance by the upper basin states. A series of informal conferences were held and a formal seven-state conference convened at Denver during the late summer of 1927, at


TOTAL REVENUE
Biennial
Attorney General's Office
INHERITANCE TAX DEPARTMENT
Millions of Dollars
0
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
1901-'02
'03-'04
'05-'06
'07-'08
'09-'10
'11-'12
'13-'14
'15-'16
'17-'18
'19-'20
'21-'22
'23-'24
'25-'26
'27-'28

which representatives of all seven states sought to compose the local differences between Arizona, California and Nevada which have stood in the way of a seven-state approval of the compact. While the results of this conference were intangible, the conference did much to clear the situation. About thirty days were spent by the Attorney General and the Rivers Commissioner at Washington, during January and February of 1928, in appearances before committees and daily conferences with those interested in pending Colorado River legislation, for the purpose of incorporation of amendments necessary to the protection of the upper basin states. Other informal conferences were held at Denver for a like purpose.

The Arkansas River situation became so acute through actions in the local federal courts by Kansas appropriators whose rights presumably were determined in the decision in *Kansas vs. Colorado,* 206 U. S. 46, that Your Excellency wisely directed the institution of a suit in the Supreme Court of the United States by the State of Colorado against the State of Kansas and the litigant Kansas corporations, to enjoin further proceedings in the local federal courts and to make effective that court's decision in the case of *Kansas vs. Colorado.* Kansas filed a motion to dismiss, which was argued November 26, 1928, and promptly overruled without prejudice. This action must be prosecuted with care and diligence during the next biennial period.

Interstate rights on the La Plata River were settled some years since by a compact between Colorado and New Mexico. Several Colorado water users objected to any water being turned down to New Mexico, and brought suit in the State District Court at Durango to enjoin the State Engineer from so administering the water as to fulfill the terms of the compact between the states. This action is now pending and should receive close attention, as it attacks the right of the State to settle its interstate water controversies by compact.

Rio Grande matters have been passing through a stage of engineering investigation preparatory to conferences for interstate compact with Texas and New Mexico or for defenses in event of suit by those states against Colorado. These investigations have been very complete and conducted with unusual skill and accuracy. A meeting of the Rio Grande Compact Commission was called for December 19th at Santa Fe, and was attended by representatives of this department.

North Platte River matters have been slowly gravitating toward the conclusion of a compact between Colorado and Wyoming, or between Colorado, Wyoming and Nebraska, and such a compact may be concluded in time for approval by the next legislature.

Water is the most important natural resource in Colorado. With water, we prosper; without it, our institutions fail. All our

rivers are interstate in character, and other states claim rights to the use of waters which originate wholly within this State. The protection of our inherent and natural rights to the first use of these waters of our own streams is of tremendous importance to the State and to every citizen. The legislature should continue liberal appropriations for defense of water rights, and no effort should be spared to protect both our present and future uses of this, our most precious and vital element.

CONCLUSION

To all the executive officers, boards, commissions and individuals whose duties have brought them to the office of the Attorney General, I extend my sincere thanks and hearty appreciation for their uniform courtesy and assistance.

At the conclusion of this biennial period and the completion of two terms as Attorney General of this State, I want to especially commend those who have worked in the office of Attorney General, most of them for the entire period, for the very loyal and able work which they have performed for our State. The compensation received by them has been much less than they would have received had they been employed in like important work in a private capacity, and in spite of this, they have rendered service which, for loyalty and ability, has never been excelled and seldom equalled. The same hearty commendation is due the Inheritance Tax Commissioner and those under him.

In a report such as this, it is hardly proper to single out and give to each member of the force the special credit which is his or her due, as it would require too much space and add nothing to the substance of the report. However, in this, my final report as Attorney General of the State of Colorado, I want to commend each and every one in the department for the loyalty, ability, integrity and devotion which they have given to the problems and the duties devolving upon them, and to assure you and the people of the State that without such devotion and ability, the work of the office would not have reached that degree of efficiency to which the State is entitled. To them is due whatever commendation or credit the office deserves for the work performed in the past four years.

Respectfully submitted,

WILLIAM L. BOATRIGHT,
Attorney General.

SCHEDULE II

LIST OF ALL CASES PENDING AND DISPOSED OF IN ALL COURTS

1927-1928

CASES IN THE SUPREME COURT OF THE UNITED STATES

State of New Mexico v. State of Colorado.

Original proceeding to establish southern boundary of Colorado and northern boundary of New Mexico. Decision of Supreme Court handed down January 26, 1926, sustaining Colorado's contention that the line of the Darling survey was the true boundary and ordering that the said line be re-surveyed at the joint expense of New Mexico and Colorado. The survey is now in progress.

---

304. October term, 1926.

Foster Cline v. Frink Dairy Company, et al.

Appeal from judgment of United States District Court for the District of Colorado, enjoining Foster Cline as District Attorney from prosecuting the Frink Dairy Company and others for violation of the Colorado Anti-Trust Law. Judgment reversed in part and affirmed in part at the cost of the appellees, the Court holding that the United States District Court could not enjoin a criminal action pending in a State Court, but also holding that the Colorado Anti-Trust Law was unconstitutional.

---

122. October term, 1927.

People, ex rel. Spears v. State Board of Medical Examiners.

Appeal from a decision of the Supreme Court of Colorado, sustaining the action of the Colorado State Board of Medical Examiners in revoking the license of Spears to practice medicine. Writ of error dismissed and judgment affirmed on jurisdictional grounds.

---

15. Original. October term, 1927.

State of Colorado v. State of Kansas, et al.

Original proceeding to determine rights of the parties to water in the Arkansas River. Defendant's motion to dismiss argued orally November 26, 1928. Pending.

---

812. October term, 1927. William Driscoll, et al. v. State Board of Land Commissioners.

Petition for a writ of certiorari to review judgment of United States Circuit Court of Appeals which affirmed judgment of United States District Court dismissing a suit brought to compel the issuance of a patent. Writ of certiorari denied.

915. October term, 1927.

J. W. Goldsmith as County Commissioner, et al. v. Standard Chemical Company.

Petition for writ of certiorari to have reviewed a decision of the United States Circuit Court of Appeals which affirmed a judgment of the United States District Court of the District of Colorado, allowing the Standard Chemical Company to recover certain taxes which it had paid under protest. Writ of certiorari denied May 21, 1928.

CASES IN UNITED STATES CIRCUIT COURT OF APPEALS

7737. J. W. Goldsmith, County Treasurer, v. Standard Chemical Company.

Appeal from judgment of United States District Court, District of Colorado, allowing Standard Chemical Company to recover taxes paid under protest. Judgment affirmed. Appealed to United States Supreme Court, No. 915.

7817. William Driscoll v. State Board of Land Commissioners.

Appeal from judgment of United States District Court, dismissing a suit to compel issuance of patent. Judgment affirmed. Appealed to United States Supreme Court, No. 812.

8022. Jackson Cochrane v. Bankers Life Company.

Appeal from a judgment of the United States District Court for the District of Colorado, allowing the Bankers Life Company to recover taxes paid under protest. Judgment affirmed.

8181. William H. Adams, et al. v. People, ex rel. Palmer, et al.

Appeal from decision of United States District Court for District of Colorado, which in a habeas corpus action released certain persons imprisoned by the National Guard during the coal strike. Appeal dismissed without costs to either party.

CASES IN THE UNITED STATES DISTRICT COURT

7962. Greeley Transportation Company v. Otto Bock, et al.

Action to restrain Public Utilities Commission from interfering with the operation of motor trucks for hire on the public highways of the state without certificates of public convenience and necessity. Injunction denied and case dismissed.

7965. J. Grant, et al. v. Otto Bock, et al.

Action to restrain Public Utilities Commission from interfering with the operation of motor vehicles for hire on public highways without certificates of public convenience and necessity. Injunction denied and case dismissed.

8124. Standard Chemical Company v. J. W. Goldsmith, County Treasurer.

Action to recover tax paid under protest. Judgment for plaintiff. Appealed to United States Circuit Court of Appeals, No. 7737.

8201. William Driscoll, et al. v. State Board of Land Commissioners.

Action to compel issuance of patent. Motion to dismiss sustained and case dismissed. Appealed to United States Circuit Court of Appeals, No. 7817.

8364. People, ex rel. Palmer, et al. v. William H. Adams, et al.

Action of habeas corpus to secure release of persons imprisoned by National Guard during coal strike. Prisoners released. Appeal to United States Circuit Court of Appeals, No. 8181.

8372. Bankers Life Company v. Jackson Cochrane, et al.

Action to recover tax paid under protest. Judgment for plaintiff. Appealed to United States Circuit Court of Appeals, No. 8022.

8487. William J. Honeyman v. Otto Bock, et al.

Application for injunction to restrain the Public Utilities Commission from interfering with the operation by the plaintiff of motor trucks for hire upon state highways without certificates of public convenience and necessity. Injunction denied and case dismissed.

8569. People, ex rel. v. Kristen Svanum, et al.

Habeas corpus action to secure release of persons imprisoned during coal strike. Dismissed.

8610. Standard Chemical Company v. J. W. Goldsmith, County Commissioner, et al.

Action to recover taxes paid under protest. Case dismissed.
Standard Chemical Company v. J. W. Goldsmith, County Commissioner, et al.

Action for refund of 1927 taxes. Judgment for plaintiff.

8616. Leo L. Spears v. David L. Clark, et al.

Action to restrain State Board of Medical Examiners from revoking license. Injunction denied.

8657. Victor-American Fuel Company v. James Dalrymple, et al.

Action to restrain defendant from requiring plaintiff to employ a certain check weighman. Demurrer sustained and case dismissed.

8718. Union Pacific Railroad Co. v. County Commissioners of Weld County.

Action to recover alleged excessive taxes. Pending.

8719. Atchison, Topeka and Santa Fe Ry. Co. v. Otero County.

Action to recover alleged excessive taxes. Pending.

8720. Atchison, Topeka and Santa Fe Ry. Co. v. County Commissioners of Bent County.

Action to recover alleged excessive taxes. Pending.

Atchison, Topeka and Santa Fe Ry. Co. v. County Commissioners of Prowers County.

Action to recover alleged excessive taxes. Pending.

Denver City Tramway Co. v. City and County of Denver.

Action to recover alleged excessive taxes. Pending.

Denver Tramway Corporation v. City and County of Denver.

Action to recover taxes paid under protest. Pending.

8777. People v. Victor-American Fuel Company.

Action to recover royalties due under coal land leases. Removed from Denver District Court. Pending.

CASES BEFORE THE INTERSTATE COMMERCE COMMISSION

16113. State of Colorado, et al. v. Atchison, Topeka and Santa Fe Railroad Company, et al.

Decision dated September 29th, involving rates on potatoes in carload lots from Greeley, Colorado, district to destinations in Arkansas, Tennessee, Mississippi and Alabama, found unreasonable, and district destinations in Missouri, Arkansas, Tennessee and Alabama found unduly prejudicial. Rates from same district to other destinations in western trunk line, southwestern and Missouri Valley territories found not unreasonable or otherwise unlawful. Prescribed reasonable rates for future.

16614. State of Colorado, et al. v. Atchison, Topeka and Santa Fe Railroad Company, et al.

Decision dated September 29th, involving rates on cabbage in carload lots from Greeley district to certain destinations in Arkansas and Oklahoma, found unreasonable. Rates to destinations in Illinois, in western trunk line, Southwestern and Missouri Valley territories found not unreasonable or otherwise unlawful. Reasonable rates for future prescribed.

17000. Rate structure investigation. Part 2. Western Trunk Line Class Rates. Ex Parte No. 87. Sub. 1. Class rates within Western Trunk Line territory. Attorney for Commission attended hearings at Chicago and Denver, and presented evidence at Denver. Brief filed August 8, 1928.

17000. Part 9. Rate structure investigation. Livestock. Western District rates. Attorney for Commission attended hearings at Salt Lake, Kansas City and Chicago. Brief filed September 14, 1928.

17000. Part 7. Rate Structure Investigation. Grain and grain products within western district and for export. Attorney for Commission attended hearings at Dallas, Texas, and Chicago, Illinois. Brief to be filed by December 31st.

13535 and 17166. Petition filed on behalf of Commission to institute investigation of rates on potatoes in cases numbered above and that effective dates of prior orders be postponed.

CASES IN UNITED STATES LAND OFFICE

Parker v. State of Colorado and the United States.

Suit to determine whether certain school lands of the state are subject to recovery by the United States on the ground that they were known mineral lands. Dismissed.

No. 9531. United States v. State of Colorado.

Action contesting title of Colorado to certain school lands on the ground that said lands were of known mineral character. Contest involves Sec. 36, T. 35 N., R. 8 W., N. M. P. M. Dismissed.

No. 9532. United States v. the State of Colorado.

Action contesting title of Colorado to certain school lands on the ground that said lands were of known mineral character. Contest involves Sec. 36, T. 35 N., R. 9W., N. M. P. M. Dismissed.

No. 9533. United States v. State of Colorado.

Contest involving Lots 3 and 4, S½ NE¼, NW¼ NW¼ and S½ NW¼ and S½ Sec. 16 and all of Sec. 36, T. 35 N., R. 10 W., N. M. P. M. Dismissed.

No. 9534. United States v. State of Colorado.

Contest involving Lots 1 to 8, NE¼ NW¼, N½ SE¼ and N½ SW¼ Sec. 16 and all of Sec. 36, T. 35 N., R. 11 W., N. M. P. M. Dismissed.

No. 9535. United States v. State of Colorado.

Contest involving S½ Sec. 16 and all of Sec. 36, T. 35 N., R. 12 W., N. M. P. M. Dismissed.

No. 9536. United States v. State of Colorado.

Contest involving Sec. 36, T. 35 N., R. 13 W., N. M. P. M. Dismissed.

No. 9537. United States v. State of Colorado.

Contest involving Sec. 36, T. 35 N., R. 13 W., N. M. P. M. Dismissed.

No. 9528. United States v. State of Colorado.

Contest involving Sec. 36, T. 34½ N., R. 9 W., N. M. P. M. Dismissed.

CIVIL CASES IN THE SUPREME COURT OF COLORADO

No.

11583. In the matter of the Estate of Edward Joyce.

Action to enforce claim of State Hospital from care and maintenance. Appeal from order of the County Court of Weld County allowing the claim. Judgment reversed in part and affirmed in part April 4, 1927.

11692. Board of County Commissioners of Montezuma County and Colorado Tax Commission v. the Cortez Land and Securities Company.

Action to secure refund of taxes. Writ of Error to District Court of Montezuma County. Judgment affirmed April 4, 1927.

11715. William V. Roberts, et al. v. James H. Duncan, et al.

Mandamus suit to compel payment of salary. Writ of Error to order of the District Court of the City and County of Denver, granting peremptory writ. Judgment affirmed April 11, 1927.

11781. Estate of John M. Waldron, Deceased, et al. v. The People.

Writ of Error to the District Court of the City and County of Denver affirming judgment of the County Court of the City and County of Denver sustaining findings of the Inheritance Tax Commissioner assessing an inheritance tax of $15,293.34 against the estate of John M. Waldron. Affirmed May 7, 1928.

11782-11783. Waite Phillips v. Board of County Commissioners of Douglas County and Colorado Tax Commission.

Actions to recover taxes paid under protest. Writ of Error to District Court of Douglas County. Judgment affirmed December 19, 1927.

11784. People of the State of Colorado, ex rel. Pikes Peak Fuel Company v. Public Utilities Commission, et al.

Writ of Error to review judgment of the District Court of the City and County of Denver, dismissing plaintiff's petition for a writ of prohibition directed to the Public Utilities Commission. Judgment affirmed April 18, 1927.

11877. Coursey v. The Industrial Commission.

Mandamus to compel payment of award of the Industrial Commission. Demurrer to complaint sustained by the District Court of Fremont County. Judgment reversed September 19, 1927.

11878. W. J. Honeyman, doing business as the Honeyman Transportation Co., v. The People.

Injunction restraining operation of motor vehicle operator for hire. Application for supersedeas denied. Writ of Error dismissed October 14, 1927.

CRIMINAL CASES IN SUPREME COURT OF COLORADO

No.	Title	Crime
11620	Dickson v. People	Embezzlement
11705	Massie v. People	Murder
11748	Fries v. People	Violating Still Law
11775	Brasher v. People	Indecent Liberties
11777	Duncan v. People	Murder by Abortion
11796	Kahn v. People	Incorrigibility
11797	Brenneman v. People	Incorrigibility
11798	Lechner v. People	Incorrigibility
11837	Stewart v. People	Killing Deer Out of Season
11844	Nelan v. People	Violating Still Law
11848	McGuire v. People	Larceny as Bailee
11853	Webb v. People	Forgery
11865	Claxton v. People	Violating Liquor Law
11876	Todd v. People	Confidence Game
11883	Koontz v. People	Indecent Liberties, Crime Against Nature
11893	Muller v. People	Vagrancy
11896	Cliff v. People	Embezzlement
11903	Noakes v. People	Murder
11903	Osborn v. People	Murder
11911	Amis v. People	Rape
11916	Van Schooten v. People	Violating Still Law
11963	Dwyer v. People	Operating Dance Hall Without License
11976	Smith v. People	Violating Liquor Law
11981	Waite, et al. v. People	Possession of Liquor
12012	Davis v. People	Bigamy
12025	Kimbrough v. People	Application for Bail
12036	Gasper v. People	Violating Still Law
12046	Gaskins v. People	Liquor Nuisance
12047	Mongone v. People	Liquor Nuisance
12080	Loos v. People	Violating Liquor Law
12082	Thuringer v. People	Assault and Battery
12086	Compton v. People	Jail Delivery
12099	In re Nottingham	Habeas Corpus
12120	Camp v. People	Receiving Stolen Sheep
12123	Wilder v. People	Violating Still Law
12128	Humrich v. People	False Pretenses
12133	Phenneger v. People	Embezzlement
12136	Dillard v. People	Violating Still Law
12146	Tell v. People	Violating Still Law
12148	Osgood v. People	Assault
12221	Sweek v. People	Larceny

CRIMINAL CASES IN SUPREME COURT OF COLORADO

Supersedeas	Disposition
Allowed	Affirmed June 27, 1927
Allowed	Affirmed July 5, 1927
Denied	Affirmed January 10, 1927
Denied	Affirmed February 28, 1927
Allowed	Affirmed December 28, 1927
Allowed	Reversed February 14, 1927
Allowed	Reversed February 14, 1927
Allowed	Reversed February 14, 1927
Allowed	Affirmed January 30, 1927
Denied	Dismissed October 14, 1927
Allowed	Affirmed January 3, 1928
Allowed	Reversed December 12, 1927
Denied	Affirmed May 31, 1927
Allowed	Affirmed November 28, 1927
Denied	Affirmed in part and reversed in part December 5, 1927
Denied	Affirmed September 12, 1927
Allowed	Affirmed July 2, 1928
Allowed	Affirmed December 12, 1927
Allowed	Affirmed December 12, 1927
Allowed	Affirmed February 20, 1928
Denied	Affirmed September 19, 1927
Denied	Affirmed November 28, 1927
Denied	Affirmed January 9, 1927
Denied	Affirmed January 3, 1928
Denied	Affirmed January 30, 1928
Denied	Affirmed January 25, 1928
Denied	Affirmed February 27, 1928
	Modified and affirmed November 26, 1928
	Affirmed October 29, 1928
Denied	Affirmed June 11, 1928
Denied	Affirmed April 2, 1928
Denied	Affirmed April 28, 1928
Denied	Affirmed May 28, 1928
Allowed	Reversed September 24, 1928
Allowed	Pending
	Pending
	Pending
	Pending
Denied	Affirmed July 9, 1928
	Pending
	Pending

No.

11905. Western Transportation Co. v. People.

Injunction restraining operation of motor vehicle operator for hire. Judgment affirmed October 31, 1927.

11928. Delbert A. Hessick, et al. v. Charles Moynihan, et al.

Action to test Chapter 142, S. L. 1927, concerning prison made goods and the sale thereof. Judgment affirmed December 12, 1927.

11935. People of the State of Colorado, ex rel. The Colorado Bar Association v. Benj. F. Napheys.

Proceedings for disbarment. Respondent disbarred August 18, 1927.

11951. Gabriel v. Board of Regents.

Action for declaratory judgment. Writ of Error to District Court of Boulder County sustaining demurrer to the complaint. Judgment affirmed April 30, 1928.

11969. The Antlers Athletic Association v. Hartung, et al.

Action to review order of the District Court of the City and County of Denver, refusing to restrain the enforcement of the 1927 act regulating boxing. Pending.

12006. The Crissey-Fowler Lumber Co. v. Charles Armstrong, Secretary of State.

Action to determine applicability of House Bill No. 430, Session Laws 1927, to owners of motor busses not used for hire. Judgment affirmed December 23, 1927.

12015. State Civil Service Commission v. Bernard Cummings.

Certiorari action to review action of Civil Service Commission dismissing employe. Writ of Error to Denver District Court granting writ of certiorari. Judgment reversed with directions to quash the writ and dismiss the action March 12, 1928.

12019. People v. City and County of Denver.

Action to collect gasoline taxes and inspection fees from the City and County of Denver as a municipal corporation. Affirmed in part and reversed in part November 26, 1928.

12035. In the Matter of the Petition of Frank Palmer, et al.

Habeas corpus action to secure the release of persons imprisoned during the coal strike of 1927. Writ quashed. Action dismissed.

12038. Charles Armstrong, Secretary of State, v. Denver Saunders System.

Mandamus to require Secretary of State to issue licenses for automobiles used by drive-it-yourself companies without payment of fee required by House Bill No. 430. Judgment District Court affirmed June 1, 1928.

No.

12043. Rio Oil and Supply Company, a corporation, v. James Duce as State Inspector of Oils, et al.

Injunction to restrain oil inspector, attorney general, state treasurer and state auditor from collecting gasoline taxes under the 1927 law. Pending.

12059. People v. City and County of Denver.

Suit to have gasoline tax imposed by the Act of 1923 declared a lien prior to general personal property taxes levied and assessed by the City and County of Denver against a gasoline dealer. Pending.

12061. Coursey v. Industrial Commission.

Mandamus to compel payment of award of the Industrial Commission. Demurrer to answer overruled and case dismissed by the District Court of Fremont County. Judgment affirmed April 2, 1928.

12068. Charles M. Armstrong, Secretary of State, v. The Johnson Storage & Moving Co.

Mandamus to compel Secretary of State to issue licenses for moving vans used exclusively within the City and County of Denver without payment of fee required by House Bill No. 430, S. L. 1927. Reversed June 4, 1928.

12089. Emily Johnson, et al. v. Colorado Bureau of Children and Animal Protection.

Action brought by heirs of Fred H. Forrester to set aside Forrester's will making a residuary bequest of the sum of $120,000.00 to the State Bureau of Child and Animal Protection. Writ of Error to Denver County Court which upheld the will. Pending.

12097. Grant McFerson as State Bank Examiner v. John I. Aiello.

Petition to require State Bank Commissioner to deliver bank records to purchaser of assets of insolvent bank. Writ of error to District Court of Las Animas County. Judgment reversed July 3, 1928.

12108. People, ex rel. Painless Parker Dentists v. State Board of Dental Examiners.

Action brought to secure a writ of prohibition restraining the State Board of Dental Examiners from revoking the license of certain employes of Painless Parker Dentists. Writ of Error to Denver District Court which dismissed the action. Pending.

12130. People, ex rel. Colorado Bar Association v. Ben B. Lindsey.

Proceedings for disbarment. Pending.

No.

12137. Richard P. Ireland v. Charles W. Elkins and the State of Colorado, et al.

Judgment against the state as garnishee. Judgment reversed September 24, 1928.

12145. Industrial Commission v. Continental Investment Company.

Action to recover a penalty. Demurrer to answer overruled and case dismissed by the District Court of the City and County of Denver. Pending.

12160. John T. Joyce as Commissioner of Mines, et al. v. The People, ex rel. Perkins.

Action in mandamus to require Commissioner Joyce to appoint from the Civil Service eligible list an inspector for mining district No. 4, and to require Governor Adams to ratify and approve such appointment. Writ of Error to an order of the District Court of the City and County of Denver. Peremptory writ issued by trial Court and supersedeas denied by Supreme Court. Case dismissed November 9, 1928.

12185. People v. The Texas Company, a corporation.

Action to collect penalty of three cents per gallon on gasoline because of failure of the Texas Company to pay its tax in full within the time prescribed by the 1927 act. Pending.

12231. Simonson v. Charles M. Armstrong, as Secretary of State.

Action in mandamus to compel the Secretary of State to place the name of A. J. Simonson on the ballot for the general election, November 6, 1928. Alternative writ issued by the District Court of the City and County of Denver. Judgment affirmed October 19, 1928.

12245. Industrial Commission v. The People, ex rel. Metz.

Action in mandamus to require the Industrial Commission to "promulgate and announce its final award and decision in the matter of" its investigation into the question of wages in the coal mines of this state during the period December 19, 1927, to March, 1928. Writ of Error to order of the District Court of the City and County of Denver awarding judgment on the pleadings against the Industrial Commission and ordering the issuance of a writ of peremptory mandamus. Pending.

12254. Public Utilities Commission, et al. v. City of Loveland.

Action to review an order of the Public Utilities Commission. Error to the District Court of Larimer County. Pending.

WORKMEN'S COMPENSATION CASES IN THE SUPREME COURT OF COLORADO

(All of the following are actions to set aside an award of the Industrial Commission.)

No.	Title of Cause	Judgment of Lower Court	Status
11317	American Radiator Co., et al. v. Industrial Commission	Award Sustained	Judgment Reversed May 14, 1927
11597	Young v. Industrial Commission	Award Sustained	Judgment Affirmed February 28, 1927
11626	Aetna Life Ins. Co., et al. v. Ind. Com., et al	Award Sustained	Judgment Affirmed March 28, 1927
11702	Zuver v. Industrial Commission, et al	Award Sustained	Judgment Affirmed January 10, 1927
11713	Industrial Commission, et al. v. Enyeart	Award Set Aside	Reversed with Directions May 16, 1927
11756	Industrial Commission, et al. v. Cornelius	Award Set Aside	Judgment Affirmed February 28, 1927
11757	Industrial Commission, et al. v. Weaver	Award Set Aside	Judgment Affirmed March 21, 1927
11769	Index Mines Corporation v. Ind. Com., et al	Award Sustained	Judgment Affirmed September 12, 1927
11801	Ind. Com., et al. v. Hover & Co., et al	Award Set Aside	Judgment Affirmed September 19, 1927
11828	Continental Inv. Co. v. Garcher, et al	Award Sustained	Judgment Affirmed January 16, 1928
11885	Largo, et al. v. Industrial Commission	Award Sustained	Judgment Affirmed September 19, 1927
11907	Employers Mutual Ins. Co., et. al. v. Ind. Com. and Mary Stewart	Award Sustained	Judgment Affirmed September 12, 1927
11941	Ind. Com. of Colo. and Standard Accident Ins. Co. v. Bracken, et al.	Award Set Aside	Judgment Reversed December 12, 1927
11942	Bracken, et al. v. Ind. Com. of Colo. and C. F. & I.	Award Sustained	Judgment Affirmed December 12, 1927
11970	Hoshiko v. Industrial Commission, et al	Award Sustained	Judgment Affirmed April 23, 1928
11977	De Beque Producers Ass'n v. Industrial Commission, et al	Award Sustained	Judgment Affirmed January 3, 1928
11985	Rosenkranz v. Industrial Commission, et al	Award Sustained	Judgment Affirmed December 27, 1927
11987	Employers Mutual Ins. Co., et al. v. Industrial Commission	Award Sustained	Judgment Affirmed February 20, 1928
11990	London Guarantee & Accident Co., et al. v. Industrial Commission and Palmos	Award Sustained	Judgment Reversed January 16, 1928

No.	Title of Cause	Judgment of Lower Court	Status
12076	Industrial Commission of Colorado, et al. v. Estates of Chas. H. Nissen, et al.	Award Set Aside	Judgment Reversed May 14, 1928
12083	S. E. French v. Industrial Commission, et al.	Award Sustained	Pending
12112	Industrial Commission and C. F. & I. v. Robinson	Award Set Aside	Pending
12114	Smart & Zurich General Accident & Liability Ins. Co. v. Radetsky, et al.	Award Sustained	Pending
12141	Central Surety & Ins. Corporation, et al. v. Industrial Commission, et al.	Award Sustained	Judgment Affirmed October 22, 1928
12159	Ruth G. Tavenor v. Royal Indemnity Co., et al.	Award Set Aside	Judgment Affirmed October 29, 1928
12195	London Guarantee & Accident Co.. et al. v. Industrial Commission, et al.	Award Sustained	Writ of Error Dismissed September 13, 1928
12229	John Thompson Grocery Co., et al. v. Industrial Commission and Healy	Award Sustained	Pending
12236	C. F. & I. Co. v. Industrial Commission and Medina	Award Sustained	Pending
12251	Rocky Mountain Fuel Co. and Industrial Commission v. Anna Kirk	Award Sustained	Pending

CIVIL CASES IN THE DISTRICT COURTS

Adams County

2197. People v. J. F. Marsh.

Action to establish boundaries. Settled and dismissed.

Union Pacific Railroad Co. v. County Commissioners of Adams County.

Suit to recover alleged excessive taxes. Pending.

Arapahoe County

2339. Atchison, Topeka & Santa Fe Railway Co. v. County Commissioners of Arapahoe County.

Suit to recover alleged excessive taxes. Pending.

Union Pacific Railroad Co. v. County Commissioners of Arapahoe County.

Action to recover excessive taxes. Pending.

Boulder County

Clifford W. Mills v. Board of Regents, University of Colorado.

Action under the declaratory judgments act to determine the validity of a contract. Demurrer sustained and case dismissed. Appealed to Supreme Court, No. 11951, under substituted name.

8617. People v. Morris Hussie.

Action to recover two-cent gasoline tax, penalties and inspection fees. Payment made in full and case dismissed.

8704. People v. Zener.

Action to recover three-cent gasoline tax and penalties. Pending.

8705. People v. Clark H. Clark.

Action to recover three-cent gasoline tax and penalty. Pending on final settlement of assignee for benefit of creditors.

Union Pacific Railroad Co. v. County Commissioners of Boulder County.

Action to recover alleged excessive taxes. Pending.

Chaffee County

2922. Charles J. Moynihan v. Delbert A. Hessick.

Action under the declaratory judgments act to determine the constitutionality of the prison made goods law. Judgment for plaintiff. Appeal to Supreme Court, No. 11928.

2966. J. H. Habenicht v. M. C. Hinderlider, State Engineer, et al.

Action to restrain state engineer from issuing order requiring head gates. Pending.

Cheyenne County

Union Pacific Railroad Co. v. County Commissioners of Cheyenne County.

Action to recover alleged excessive taxes. Pending.

Clear Creek County

E. M. Patrick v. Board of County Commissioners.

Action to recover taxes. Pending.

Town of Georgetown, et al. v. Colorado & Southern Railway, et al.

Injunction to restrain abandonment of railroad. Pending.

Conejos County

Elizabeth A. C. Horton v. Federal Fire and Marine Insurance Company.

An action in which securities deposited by the defendant with the insurance commissioner were attempted to be garnished. Insurance commissioner was released from the garnishment proceedings.

Crowley County

756. Foster Lumber Company v. State Highway Department.

Suit to recover for materials and supplies furnished in the construction of a state highway. Settled and dismissed.

Denver County

29430. People, ex rel. Harris v. William H. Adams, et al.

Habeas corpus action to secure release of persons imprisoned during coal strike. Writ discharged and case dismissed.

58263. State Board of Land Commissioners v. W. G. Linch, et al.

Action to secure bank rent. Pending.

58264. People v. Frank Welch, et al.

Action to recover rent. Pending.

58726. State Board of Land Commissioners v. John Marlman.

Action to recover back rent. Pending.

60305. People v. Lee Witcher.

Action to recover rent. Pending.

61212. People v. Geo. Patrick.

Action for trespass. Pending.

62192. State Board of Land Commissioners v. S. M. Moses.

Action to recover rent. Pending.

88883. People v. A. T. Burbridge, et al.

Suit to restrain operation of bus line. Pending.

89479. People v. J. J. Ballard.

Action to recover rent. Dismissed.

91773. People v. Royal Oil Company.

Action to recover two-cent gasoline tax and inspection fees. Receiver appointed and discharged after paying to state net receipts from receivership.

95022. People v. William J. Honeyman, et al.

Suit to enjoin operation of motor truck line. Removed to United States District Court, No. 8487.

95023. People v. H. P. Ferree.

Suit to enjoin operation of motor truck line. Case dismissed.

95024. People v. Albert J. Herbertson.

Suit to restrain operation of bus line. Pending.

95025. People v. L. N. White.

Suit to restrain operation of bus line. Pending.

95026. People v. Tony Archer.

Suit to restrain operation of bus line. Pending.

95028. People v. Midwest Transit Company.

Suit to restrain operation of bus line. Pending.

95144. People v. John Monett.

Suit to restrain operation of bus line. Pending.

95608. Estate of John M. Waldron, Deceased.

Appeal from decision of the County Court of the City and County of Denver sustaining findings of the Inheritance Tax Commissioner assessing a tax of $15,293.34 against said estate. Judgment of the County Court affirmed.

96576. Christopher C. Boyd v. Ralph B. Dergance.

Mandamus action to compel payment of blind benefits. Case dismissed for want of prosecution.

96617. People v. Union Mutual Insurance Company.

Receivership action to dissolve insurance company. Pending.

96750. People, ex rel. Public Utilities Commission v. D. E. Tilden.

Suit to enjoin operation of motor truck line. Injunction granted. Pending.

96751. People, ex rel. Public Utilities Commission v. Harry Large, et al.

Suit to enjoin operation of motor truck line. Injunction granted. Pending.

97513. People v. H. J. Nance.

Action to recover one-cent and two-cent gasoline tax. Settled as to two-cent tax and pending as to one-cent tax.

97797. The Madsen Construction Company v. L. D. Blauvelt.

Action in mandamus to compel allowance of claim for extra labor and material alleged to have been furnished by plaintiff on Federal Aid Project No. 283B. Pending.

97953. People v. Shield Oil Company.

Action to recover two-cent gasoline tax. Receiver appointed and discharged after making final report and paying net receipts in to court. Appealed to Supreme Court, No. 12059, on question of priority of gasoline tax over general taxes.

98002. Barnard Cummings v. State Civil Service Commission.

Certiorari action to review order of Civil Service Commission discharging petitioner. Judgment for petitioner. Appealed to Supreme Court, No. 12015.

98042. Rio Oil Company v. James Duce.

Injunction action to restrain collection of gasoline tax. Demurrer sustained and case dismissed. Appealed to Supreme Court, No. 12043.

98288. Limon National Bank v. Raymond Miller, et al.

Action to recover money paid on canceled certificates of purchase of state land. Pending.

98415. People v. The Texas Corporation.

Action to recover gasoline tax, inspection fees and penalties. Judgment for defendant. Appealed to Supreme Court, No. 12185.

98467. People v. City and County of Denver.

Action to recover gasoline tax, inspection fees and penalties. Judgment for defendant. Appealed to Supreme Court, No. 12019.

99076. Quincy Ricker National Bank and Trust Company v. Raymond Miller, et al.

Action to recover money paid on canceled certificates of purchase of state land. Pending.

99079. Christopher C. Boyd v. R. P. Wildes, et al.

Mandamus action to compel payment of blind benefits. Demurrer sustained and case dismissed.

100017. People v. Zinn.

Action to recover three-cent gasoline tax and penalties. Pending.

100157. Blayney-Murphy Company v. Charles M. Armstrong.

Mandamus action to secure issuance of automobile license. Judgment for petitioner.

100222. People, ex rel. Wendelin, et al. v. William H. Adams, et al.

Habeas corpus action to secure discharge of member of National Guard. Dismissed.

100281. Johnson Storage & Moving Company v. Charles M. Armstrong.

Mandamus action to require issuance of automobile license. Judgment for plaintiff. Appealed to Supreme Court, No. 12068.

100282. John L. East v. Patrick Hamrock, et al.

Mandamus action to secure certification of plaintiff as warden of reformatory. Judgment for defendants.

100315. Painless Parker Dentist, et al. v. State Board of Dental Examiners.

Injunction action to restrain dental board from conducting a hearing to determine whether or not licenses of those employed by Painless Parker Dentists should be revoked. Judgment for defendants.

100393. Denver Saunders System, et al. v. Charles M. Armstrong.

Mandamus action to compel issuance of automobile license. Judgment for petitioner. Appeal to Supreme Court, No. 12038.

100447. Henry Bitter v. Charles M. Armstrong.

Mandamus action to compel issuance of automobile license. Pending.

100490. James J. Boiz, et al. v. John L. McMenamin.

Action of habeas corpus to secure release of children from State Home for Dependent Children. Writ quashed and case dismissed.

100646. People, ex rel. Merchants Fire Insurance Company v. Jackson Cochrane.

Action in mandamus to compel return of securities. Judgment for plaintiff.

100696. People, ex rel. Painless Parker, et al. v. State Board of Dental Examiners.

Action to secure a writ of prohibition restraining the Dental Board from conducting a hearing to determine whether or not the license of certain employes of Painless Parker should be revoked. Motion to quash sustained and case dismissed. Appealed to Supreme Court, No. 12108.

101266. National Life Association v. Jackson Cochrane.

Action in mandamus to compel approval of an insurance policy. Judgment for defendant.

101991. People, ex rel. L. M. Perkins v. John T. Joyce as Commissioner of Mines, et al.

Mandamus to compel the making of an appointment to the office of inspector of mines. Judgment for relator. Appealed to Supreme Court, No. 12160.

102161. People, ex rel. Charles Metz v. Industrial Commission.

Mandamus to compel making of an award. Judgment for petitioner. Appealed to Supreme Court, No. 12245.

102559. People v. Victor-American Fuel Company.

Action to recover royalties due under coal land leases. Removed to United States District Court, No. 8777.

102560. People v. Colorado Fuel & Iron Co.

Action to recover royalties due on coal land leases. Pending.

102974. People v. Albin and Lindsey.

Action to recovery three-cent gasoline tax. Pending.

103257. A. J. Simonson v. Chas. M. Armstrong.

Action in mandamus to require the Secretary of State to place petitioner's name on ballot. Judgment for petitioner. Appealed to Supreme Court, No. 12231.

103477. National Educational Association v. M. H. Alexander, Deputy Labor Commissioner.

Action in mandamus to require issuance of a license to an employment agency. Pending.

Antlers Athletic Association v. Gus Hartong.

Action to restrain enforcement of 1927 act regulating boxing. Judgment for defendant. Appealed to Supreme Court, No. 11969.

Atchison, Topeka & Santa Fe Railway Co. v. City and County of Denver.

Action to recover alleged excessive taxes. Pending.

De Stelle DeLappe v. William D. MacGinniss.

Injunction to restrain payment of salary. Case dismissed.

Farmer-Labor Party of Colorado v. Stevens, et al.

Injunction to restrain defendant from using the name of the Farmer-Labor Party. Dismissed.

Union Pacific Railroad Co. v. City and County of Denver.

Action to recover alleged excessive taxes. Pending.

Lindley N. White v. Public Utilities Commission.

Petition for review of award of Public Utilities Commission. Pending.

Dolores County

Rio Grande Lumber Co. v. County Commissioners.

Suit to recover taxes. Pending.

Douglas County

1017. State Highway Department v. Louem Donley, et al.

Condemnation action to secure right of way for highway. Case dismissed.

1027. Waite Phillips v. Board of County Commissioners.

Action to correct alleged erroneous tax assessment. Judgment for defendant. Appeal to Supreme Court, No. 11782.

1035. State Highway Department v. Gladys Cox, et al.

Mandamus action to secure right of way for highway. Judgment for petitioner.

1058. Atchison, Topeka & Santa Fe Railway Co. v. County Commissioners of Douglas County.

Action to recover alleged excessive taxes. Pending.

State Highway Department v. George Cole Briscoe, et al.

Condemnation action to secure right of way for highway. Case dismissed.

Waite Phillips v. Board of County Commissioners.

Action to correct alleged erroneous tax assessment. Judgment for defendants. Appeal to Supreme Court, No. 11783.

Eagle County

State Highway Department v. Charles Rush, et al.

Condemnation action to secure right of way for highway. Settled and dismissed.

Elbert County

654. Jessie McConnell v. Wythe McConnell.

Action to secure money paid to the state in a partition suit as funds belonging to a party in interest whose address was unknown. Order for repayment entered.

Union Pacific Railroad Co. v. County Commissioners of Elbert County.

Action to recover alleged excessive taxes. Pending.

El Paso County

16169. State Highway Department v. Frank Hudson, et al.

Mandamus action to secure right of way for highway. Order for temporary possession entered. Pending.

16490. Crissey-Fowler Lumber Company, et al. v. Charles M. Armstrong, et al.

Mandamus action to secure issuance of automobile license. Judgment for petitioners. Appeal to Supreme Court, No. 12006.

16629. State Highway Department, et al. v. A. W. Haigler, et al.

Action to condemn right of way for a highway. Order for temporary possession entered. Pending.

16630. State Highway Department, et al. v. Florence Lindley, et al.

Action to condemn right-of-way for a highway. Order for temporary possession entered. Pending.

16631. State Highway Department, et al. v. M. A. London, et al.

Action to condemn right-of-way for a highway. Order for temporary possession entered. Pending.

16632. State Highway Department, et al. v. Willis Fiedler, et al.

Action to condemn certain lands for right-of-way for a highway. Order for temporary possession entered. Pending.

16675. William John Honeyman v. Public Utilities Commission, et al.

Appeal from ruling of Public Utilities Commission. Case dismissed.

16758. Atchison, Topeka & Santa Fe Railway Co. v. County Commissioners of El Paso County.

Action to recover alleged excessive taxes. Pending.

Alfred T. Burbridge v. Public Utilities Commission, et al.

Certiorari action to review an order of the Public Utilities Commission. Judgment for respondent.

Fremont County

4858. Atchison, Topeka & Santa Fe Railway Co. v. County Commissioners of Fremont County.

Action to recover alleged excessive taxes. Pending.

D. L. Coursey v. Industrial Commission.

Action in mandamus to compel Industrial Commission to enforce payment of an award. Judgment for defendant. Appealed to Supreme Court, No. 12061.

La Plata County

4089. The La Plata River and Cherry Creek Ditch Company v. M. C. Hinderlider, State Engineer, et al.

Action to restrain state engineer in distribution of water. Pending.

Larimer County

5739. City of Loveland v. Public Utilities Commission, et al.

Appeal from an order of the Public Utilities Commission. Judgment for petitioner. Appeal to Supreme Court, No. 12254.

5780. Union Pacific Railroad Co. v. County Commissioners of Larimer County.

Action to recover alleged excessive taxes. Pending.

Las Animas County

11746. People v. John Zurowski.

Action to recover two-cent gasoline tax. About one-half paid and action still pending on the balance.

John Aiello v. Grant McFerson.

Petition to require State Bank Commissioner to deliver bank records to the purchaser of the assets of an insolvent bank. Petition granted. Appealed to Supreme Court.

Lincoln County

Union Pacific Railroad Co. v. County Commissioners of Lincoln County.

Action to recover alleged excessive taxes. Pending.

Logan County

Union Pacific Railroad Co. v. County Commissioners of Logan County.

Action to recover alleged excessive taxes. Pending.

Mesa County

4726. Independent Lumber Company v. State Highway Department, et al.

Suit to recover for materials and supplies furnished in the construction of a state highway. Settled and dismissed.

Montezuma County

925. T. A. Schonberg, et al. v. Board of County Commissioners, et al.

Action to recover taxes. Pending.

Morgan County

5094. People v. William Jones.

Action to recover two-cent gasoline tax and inspection fees. Payment made in full and case dismissed.

5259. Union Pacific Railroad Co. v. County Commissioners of Morgan County.

Action to recover alleged excessive taxes. Pending.

Otero County

People v. R. H. McNeal.

Action to recover two-cent gasoline tax and inspection fees. Payment made in full and case dismissed.

Phillips County

1718. People v. Perry Brooks and L. C. Hartman.

Action to recover two-cent gasoline tax and penalty. Judgment for plaintiff.

Pueblo County

20407. People v. Stanley Fruit Company.

Action to collect melon inspection fees. Pending.

People v. Modern Pioneers of America.

Quo warranto action to take away corporate franchise of an insurance mompany. Judgment for plaintiff.

Board of County Commissioners v. State Board of Land Commissioners.

Action to condemn state land. Pending.

People v. Stanley Fruit Co.

Action to recover melon inspection fees. Pending.

Atchison, Topeka & Santa Fe Railway Co. v. County Commissioners of Pueblo County.

Action to recover alleged excessive taxes. Pending.

Sedgwick County

1227. Union Pacific Railroad Co. v. County Commissioners of Sedgwick County.

Action to recover alleged excessive taxes. Pending.

Washington County

Union Pacific Railroad Co. v. County Commissioners of Washington County.

Action to recover alleged excessive taxes. Pending.

Weld County

7379. People, ex rel. Richardson, et al. v. William H. Adams, et al.

Habeas corpus action to secure release of persons imprisoned during coal strike. Judgment for respondent.

7383. In the matter of petition of Frank Palmer, et al.

Habeas corpus action to secure release of persons imprisoned during coal strike. Writ discharged and case dismissed. Appealed to Supreme Court, No. 12035.

7746. E. V. Morrison v. Public Utilities Commission.

Action of certiorari to review order of Public Utilities Commission. Judgment for defendants.

N. J. Fitzmorris v. Public Utilities Commission.

Certiorari action to review an order of the Public Utilities Commission. Judgment for respondent.

WORKMEN'S COMPENSATION CASES IN THE DISTRICT COURTS OF COLORADO

Adams County

H. C. Reidy v. Industrial Commission.

Action to set aside award. Award affirmed.

Boulder County

The Ontario Mining Company v. Industrial Commission.

Action to set aside an award. Pending.

S. E. French v. Industrial Commission.

Action to set aside an award. Award affirmed. Pending in Supreme Court.

Denver County

94395. Industrial Commission v. Flood Market.

Action to recover a penalty. Dismissed.

93779. Hover & Co. v. Industrial Commission, et al.

Action to set aside an award. Award set aside.

95073. Continental Investment Co. v. Industrial Commission, et al.

Action to set aside an award. Award affirmed.

The Royal Indemnity Company v. The Industrial Commission.

Action to set aside award. Award set aside.

New Jersey Fidelity & Plate Glass Insurance Company v. Industrial Commission.

Action to set aside award. Pending.

Maryland Casualty Company v. Industrial Commission.

Action to set aside award. Pending.

Standard Accident Insurance Company v. Industrial Commission.

Action to set aside award. Award affirmed.

Maryland Casualty Company v. Industrial Commission.
Action to set aside award. Pending.

A. H. Flood v. Industrial Commission.
Action to set aside award. Pending.

John J. Robinson v. Industrial Commission.
Action to set aside award. Award set aside. Pending in Supreme Court.

Colorado Fuel & Iron Company v. Industrial Commission and Longino Medina.
Action to set aside award. Award affirmed. Pending in Supreme Court.

Zurich General Accident & Liability Insurance Company and Hazelton v. Industrial Commission.
Action to set aside award. Award affirmed. Pending in Supreme Court.

Smart and Zurich General Accident & Liability Insurance Company, Ltd., v. Industrial Commission.
Action to set aside award. Award affirmed in District Court of Denver. Pending in Supreme Court.

Royal Indemnity Company v. Industrial Commission and Tavenor.
Action to set aside award. Award set aside. Judgment affirmed in Supreme Court.

Bolen v. Industrial Commission.
Action to set aside award. Award affirmed.

John Thompson Grocery Company v. Industrial Commission.
Action to set aside award. Award affirmed. Writ of Error issued by Supreme Court where it is pending.

Colorado Fuel & Iron Company v. Industrial Commission and Gurdetti.
Action to set aside award. Award affirmed.

United States Casualty Company v. Industrial Commission.
Action to set aside award. Award affirmed.

Denver Tramway Company v. Industrial Commission and Eisele.
Action to set aside award. Award set aside.

London Guarantee & Accident Company v. Industrial Commission.
Action to set aside award. Award set aside.

London Guarantee & Accident Company, Limited, v. Industrial Commission.
Action to set aside award. Award affirmed by District Court. Appeal to Supreme Court. Writ of Error dismissed.

Polo Hernendez v. Industrial Commission.
Action to set aside award. Pending.

A. T. Lewis & Sons Dry Goods Company v. Industrial Commission.
Action to set aside award. Pending.

Employers' Mutual Insurance Company v. Industrial Commission.
Action to set aside award. Award affirmed. Writ of error issued from Supreme Court.

Employers' Mutual Insurance Company v. Industrial Commission.
Action to set aside award. Award affirmed.

Grand County

Industrial Commission v. W. H. Wood.
Action to recover a penalty. Dismissed.

Huerfano County

Steve Metcos v. Industrial Commission.
Action to set aside award. Award affirmed.

Jefferson County

Industrial Commission v. Popp.
Action for penalty. Pending.

Las Animas County

Luigi Juliano v. Industrial Commission.
Action to set aside award. Pending.

Pueblo County

Central Surety & Insurance Corporation v. Industrial Commission.
Action to set aside award. Award affirmed.

Commercial Casualty Insurance Company v. Industrial Commission.
Action to set aside award. Award affirmed.

William Comerford v. Industrial Commission.
Action to set aside award. Pending.

Heigert v. Industrial Commission.
Action to set aside award. Award affirmed.

Summit County

Industrial Commission v. Aco Mining Company.
Action to recover insurance premiums. Pending.

Weld County

Greeley Gas & Fuel Company v. Industrial Commission.
Action to set aside award. Award affirmed.

Greeley Gas & Fuel Company and The Ocean Accident & Guarantee Corporation, Limited, v. Industrial Commission.
Action to set aside award. Remanded for further testimony.

CIVIL CASES IN THE COUNTY COURT

Denver County

Ireland v. Elkins, et al.
Garnishment proceedings against the state to collect a debt against a state employee. Judgment for the plaintiff.

ESCHEAT CASES AND PROBATE CASES—COUNTY COURTS

Archuleta County

Estate of Hans Wieck, deceased.
Pending.

Boulder County

Estate of Fred Hicks, deceased.
Estate closed and money paid to State Treasurer.

Estate of Maggie Stolns, deceased.
Petition of claimants for order on State Treasurer to pay out money. Petition granted.

Estate of Ellen Wallon Bergen, deceased.
Pending.

Chaffee County

Estate of Chas. E. Roemke, deceased.
Pending.

Estate of Charles W. Marsh, deceased.
Pending.

Estate of Thomas H. Thompson, deceased.
Pending.

Estate of Sabrina A. Newell, deceased.
Pending.

Clear Creek County

Estate of Georgia Vroman, deceased.
Estate closed and money paid to State Treasurer.

Denver County

Estate of Edward Campbell, deceased.
Estate will probably escheat. Pending.

In the matter of the estate of Mary Scanlan, deceased.
Estate will probably escheat. Pending.

Estate of Rose Roma (Thrilling).
Estate closed and money paid to the State of Colorado.

Estate of Charles Beck.
This estate will probably escheat. Pending.

Estate of Carrie Brown Nelson, deceased.
Estate will probably escheat. Pending.

Estate of Kate C. Manley, deceased.
Estate will probably escheat. Pending.

Estate of Albert Johnson, deceased.
Estate will probably escheat. Pending.

Estate of William J. Seebold, deceased.
Estate will probably escheat. Pending.

Estate of Andy Irving, deceased.
Estate will probably escheat. Pending.

Estate of Ben Olsen, deceased.
Estate closed and money paid to the State Treasurer.

Estate of George C. Wortman, deceased.
Estate closed and money paid to State Treasurer.

Estate of John Seck, deceased.
Estate closed and money paid to State Treasurer.

Estate of Thomas L. Morgan, deceased.
Estate closed and money paid to State Treasurer.

Estate of Frank Bowers, deceased.
Estate closed and money paid to State Treasurer.

Estate of Minnie Easton, deceased.
Estate closed and money paid to State Treasurer.

Estate of Edward Anderson, deceased.
Estate closed and money paid to State Treasurer.

Estate of J. Albert Grossman, deceased.
Estate closed and money paid to State Treasurer.

Estate of Ella Conboy, deceased.

Petition of claimants for order on State Treasurer to pay out money denied.

Estate of George B. Ehrenkrook, deceased.

Caveat and objections entered by contestant and demurrer to caveat by the state. Demurrer overruled July 9, 1927. Judgment for contestants.

Estate of John M. Waldron, deceased.

Proceeding to assess an inheritance tax on said estate. Findings of the Inheritance Tax Commissioner assessing a tax of $15,293.34 against said estate sustained.

Estate of Christian Muller, deceased.

Petition for repayment of money from escheat fund. Granted.

Estate of Edmond H. James, deceased.

Petition for repayment of money paid to State Treasurer's escheat fund. Granted.

Estate of David Parish, deceased.

Petition for repayment of money paid to State Treasurer's escheat fund. Granted.

Estate of Fred H. Forrester, deceased.

Contest instituted by heirs of Fred H. Forrester over probate of Forrester will making State Bureau of Child and Animal Protection residuary legatee. Will admitted to probate. Writ of Error to Supreme Court. Pending.

Estate of Minnie Miller, deceased.

Petition for repayment of money paid to State Treasurer's escheat fund. Petition granted.

Estate of Adam Weiss, deceased.

Pending.

Estate of Peter Healy, deceased.

Petition for construction of will filed by State of Colorado. Will construed as contended for by the State of Colorado. Writ of error to the Supreme Court. Pending.

Estate of Mildred Pullen, insane.

Claim of State Hospital for $695.69 allowed September 4, 1928.

Dolores County

Estate of Jos. Best, deceased.

Pending.

Elbert County

Estate of Elizabeth Harry, deceased.

Estate closed and share of one heir paid to State Treasurer.

El Paso County

Estate of James A. Mundy.

Petition of claimant for order on State Treasurer to pay out money and turn over mining stocks. Petition granted.

Estate of Sarah Elizabeth Ryan, deceased.

Claim of Harry L. Robbins allowed. Estate did not escheat.

Estate of Andrew J. Conrad, deceased.

Estate closed and money paid to State Treasurer.

Estate of Ira Harris, deceased.

File given to this office for investigation. Estate disposed of under terms of will.

Estate of Michael Maher, deceased.

Estate closed and money paid to State Treasurer.

Fremont County

Estate of John Johnson, deceased.

Pending.

Garfield County

Estate of Mary Sheets, deceased.

File sent to Attorney General's office for investigation. Claim filed by heirs and allowed by Court.

Estate of Thomas Harmon, deceased.

File sent to Attorney General's office for investigation. Estate closed and money paid to State Treasurer. Reopened and money ordered to be paid to administrator.

Gunnison County

Estate of Matilda Elsen, deceased.

Pending.

Estate of Joseph Sokacst, deceased.

Pending.

Estate of Joseph Fisher, deceased.

Pending.

Jefferson County

Estate of Clamancy M. McIlvoy, deceased.

Petition for repayment of money paid to State Treasurer's escheat fund. Granted.

Estate of Sarah Jones, deceased.

Pending.

Lake County

Estate of Joe Lang, deceased.

File given to attorney general for investigation. Estate insolvent.

La Plata County

Estate of Theodore C. La Feiver, deceased.

Pending.

Estate of Nick Busser, deceased.

Pending.

Larimer County

Estate of Hoken Anderson.

Petition of claimants for order on State Treasurer to pay out money. Petition granted.

Estate of Sarah Sams, deceased.

Estate closed and money paid to State Treasurer.

Estate of Jos. J. Scanlon.

Pending.

Las Animas County

Estate of Angelo Groziano, deceased.

Estate closed and money paid to State Treasurer.

Estate of Daniel Schultz, deceased.

Estate closed and money paid to State Treasurer. Petition filed by claimants to estate and disallowed.

Estate of Adolph Werner, deceased.

Estate closed and money paid to State Treasurer.

Morgan County

Estate of Jane O'Hara, deceased.

Pending.

Pueblo County

Estate of John Benson, deceased.
Estate closed and money paid to State Treasurer.

Estate of James Green, deceased.
Estate closed and money paid to State Treasurer.

Estate of W. H. Kletzell, deceased.
Estate closed and money paid to State Treasurer.

Estate of Frank G. Crompton, deceased.
Funds of estate paid into State Treasurer estate fund January 10, 1927.

Otero County

Estate of Andrew Farrelly, deceased.
Petition for repayment of money paid to State Treasurer's escheat fund. Petition granted.

Rio Blanco County

Estate of Robert Watkin, deceased.
Estate closed and money paid to State Treasurer.

Rio Grande County

Estate of Matilda Nelson, deceased.
Estate closed and money paid to State Treasurer.

Estate of Perry J. Nelson, deceased.
Estate closed and money paid to State Treasurer.

Estate of James Nelson, deceased.
Caveat and objections entered to probate of will. Pending.

San Miguel County

Estate of Axel Rose, deceased.
Estate closed and money paid to State Treasurer.

Estate of William Matthew, deceased.
Pending.

Teller County

Estate of Arthur Alstrum, deceased.
Estate closed and share of one heir paid to State Treasurer.

Estate of Joe Lamisch, deceased.
Estate closed and money paid to State Treasurer.

Weld County

In the matter of the estate of Edward Joyce, insane, lately deceased.

Claim of Colorado State Hospital for care and maintenance. Order entered allowing the claim in full. Writ of Error to the Supreme Court.

Menard County, Illinois

Estate of Frank Swanson, deceased.

File given to Attorney General for investigation. Pending.

CASES IN JUSTICE OF THE PEACE COURTS

Conejos County

People v. Ruybal.

Action of forcible entry and detainer to recover possession of state land. Dismissed.

Denver County

Ireland v. Elkins, et al.

Garnishment proceedings against the state to collect a debt against a state employee. Judgment for plaintiff. Appeal to the County Court of Denver County.

Weber v. Hinderlider, et al.

Money demand. Case dismissed.

Logan County

People v. Moon.

Action of forcible entry and detainer to recover possession of state land. Judgment for plaintiff.

RECAPITULATION

In the United States Supreme Court—Cases disposed of, 4; cases pending, 2; total, 6.

In the United States Circuit Court of Appeals—Cases disposed of, 4; cases pending, 0; total, 4.

In the United States District Court—Cases disposed of, 12; cases pending, 7; total, 19.

In the Interstate Commerce Commission—Cases disposed of, 2; cases pending, 4; total, 6.

In the United States Land Office—Cases disposed of, 9; cases pending, 0; total, 9.

In the Colorado Supreme Court (Criminal)—Cases disposed of, 35; cases pending, 6; total, 41.

In the Colorado Supreme Court (Civil)—Cases disposed of, 24; cases pending, 10; total, 34.

In the Colorado Supreme Court (Workmen's Compensation)—Cases disposed of, 23; cases pending, 6; total, 29.

In the Colorado District Court (Civil)—Cases disposed of, 58; cases pending, 60; total, 118.

In the Colorado District Court (Workmen's Compensation)—Cases disposed of, 27; cases pending, 11; total, 38.

In the County Court (Civil)—Cases disposed of, 1; cases pending, 0; total, 1.

In the County Court (Escheat and Probate)—Cases disposed of, 48; cases pending, 29; total, 77.

In the Justice of the Peace—Cases disposed of, 4; cases pending, 0; total, 4.

Total number of cases disposed of in all courts.....251

Total number of cases pending in all courts.....135

Total number of cases handled during the biennial period.....386

SCHEDULE III

OPINIONS AND SYLLABI OF OPINIONS

RENDERED DURING THE BIENNIAL PERIOD 1927-1928

Note: These syllabi and opinions are reported in the chronological order of the dates on which the opinions were rendered. A copy of each opinion is on file under a number corresponding with that of the syllabus.

OPINIONS AND SYLLABI OF OPINIONS

1. TAXATION

To W. J. Littleton and Frank R. Dunlavy, Jan. 7, 1927.

The assessment of a bank in solido is not authorized by law.

When property belonging to a bank which has failed has been underassessed, recovery can only be had from the stockholders.

2. CIVIL SERVICE

To W. T. Lambert, Jan. 8, 1927.

Paragraph 5 of Sec. 11 of the Rules of the Commission is void and of no effect, as it attempts to delegate to the appointing power the right to suspend an officer pending the disposition of charges preferred—this power being vested exclusively in the commission as incident to its power to remove.

3. CIVIL SERVICE

To W. T. Lambert, Jan. 8, 1927.

Paragraph 2 of Rule 1 adopted by the Commission requiring that no executive business can be transacted or hearing of charges had without the presence of all the members of the commission, is null and void for the reason that it prevents a majority of the Commission from transacting necessary business.

4. CIVIL SERVICE

To Governor Morley, Jan. 11, 1927.

The Commission is not compelled to hear and finally determine any charge which may be filed against a civil service employe within 30 days after such charges are filed.

5. CIVIL SERVICE

To Civil Service Commission, Jan. 13, 1927.

The commission acquires jurisdiction to hear and determine, when charges specifically stated with substantial certainty, reduced to writing, and signed by the complainant are filed with the commission.

6. HIGHWAY DEPARTMENT

The Governor may not make any material changes or alterations in the Highway Budget after it has once been made for the year.

To Governor Adams, Jan. 21, 1927.

Dear Sir:

You have orally requested my opinion upon the question of whether or not the Governor of Colorado has the power to change the annual budget of the State Highway Department after that

budget has been finally made up by the Governor and returned to the State Highway Department, as provided by law.

This office has heretofore held that the Governor does not have the power so to change the annual budget as to abolish certain departments in the Highway Department, and this opinion was upheld by Judge Butler of the District Court of Denver about a year ago in the case of *Elkins et al. v. Davis, State Auditor, et al.* In his opinion rendered in deciding the Elkins case, among other things, he said:

> "Assuming (but not deciding) that the Governor is the one who, under the law, should make the budget for the year, when he has exercised his power by making a budget, he cannot from time to time make new budgets throughout the year. If after making a budget in December, he can make another in January and still another in February, he can do so every succeeding month. There must be a time when the right to make budgets ends, and that time is when the Governor has once exercised the power conferred upon him by statute; this is on the assumption (but not deciding) that the statute confers such power upon him."

In his opinion Judge Butler further remarked that it is possible that certain errors in a budget may be corrected by amendment.

It is my opinion that the 1927 Highway Budget having been finally made up by your predecessor in office, you have not the power to make any material changes or alterations therein.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

7. JUSTICE OF THE PEACE

To J. M. Leahy, Jan. 21, 1927.

A justice of the peace must pay over to the county treasurer all fines collected, and may not by arrangement with the county commissioners retain fees and fines to the amount of $60 per month, or any other amount as compensation.

8. CITIES AND TOWNS

To Edward B. Morgan, Jan. 22, 1927.

Ordinarily the legislative function of levying taxes is to be exercised by a municipal corporation by ordinance. A mere resolution is insufficient. However, there is nothing in the statutes or authorities commanding that the annual levy be created by ordinance.

9. **SCHOOLS**

To C. A. Bowle, Jan. 25, 1927.

A school district may invest the sinking fund accumulated for the payment of bonds not yet due or redeemable, in government or state banks in accordance with provisions of Secs. 6695-6, Mills Ann. Stat. 1912, which have not been repealed, although not included in C. L. 1921.

10. **FEES AND SALARIES**

To R. B. Canda, Jan. 26, 1927.

Surplus fees over and above the salaries which are to be paid out of fees in certain counties, shall be paid into the county treasury.

The amount paid deputies as salary and the tenure of their office shall not be valid unless approved by the board of county commissioners.

11. **OFFICERS**

To Thos. A. Nevins, Jan. 28, 1927.

In an action on the bond of a public officer where both the county and the state are interested, the statute of limitations would not bar the claim of the state, although it had run against the claim of the county.

12. **SCHOOLS**

To Paul M. Williams, Jan. 28, 1927.

The county treasurer may register legal warrants only. To be legal, warrants must be signed by the president, secretary and treasurer of the district.

13. **SCHOOLS**

To. J. N. Medill, Feb. 3, 1927.

A school district whose school building is destroyed by fire, and which has not sufficient funds on hand, or levied, to rebuild, is entitled to aid from the Permanent School Emergency or Call Fund established in 1911.

14. **PUBLIC TRUSTEE**

To The Herald Publishing Co., Feb. 7, 1927.

Fees for publishing public trustees' sale notices are governed by Sec. 8, Ch. 139, S. L. 1923, and not by the Public Trustee Act.

15. **MOTOR VEHICLES**

To Chas. M. Armstrong, Feb. 7, 1927.

The Motor Vehicle Law, The Automobile Theft Law and the Automobile Title Law are so connected as to be inseparable, and cannot be administered as separate departments.

16. **NEWSPAPERS**

To Chester Short, Feb. 7, 1927.

Under Sec. 4, Chap. 139, S. L. 1923, notices may be published in any newspaper having a general circulation and printed and published in whole or in part in the county, where there is no legal newspaper.

17. **JUSTICE OF THE PEACE**

To Earl J. McCarty, Feb. 9, 1927.

A justice of the peace, failing of election, does not hold over until the next election where the successful candidate fails to qualify. A vacancy occurs to be filled by appointment.

18. **OFFICERS**

To Hon. Richard C. Callen, Feb. 15, 1927.

Upon acceptance of and qualification for the office of U. S. Marshal, a member of the General Assembly would be considered by law to have abandoned his office as such member, and would automatically cease to be such member.

19. **COUNTY COMMISSIONER**

To Wm. R. Kelly, Feb. 15, 1927.

A county commissioner elected prior to 1925 is not entitled to compensation as superintendent of the poor, under Ch. 75, S. L. 1925.

20. **TRADING COUPONS**

To W. H. Cobb, Feb. 16, 1927.

The issuance of merchandise trading coupons to employes against their credit for labor are unlawful and utterly void in the hands of any person, company or corporation with the knowledge that the same have been issued in pursuance of the "Truck system."

21. **LUNATICS**

To Dr. H. A. LaMoure, Feb. 17, 1927.

The superintendent of the State Hospital should deny a request to have a patient in the hospital examined by a private physician unless the committing court has ordered such examination.

22. **PUBLIC TRUSTEE**

To Thos. M. Welch, Feb. 17, 1927.

Sec. 5045, C. L. 1921, requires that a public trustee shall execute a bond before entering upon the duties of his office, and such bond should be filed within a reasonable time.

23. RAILROADS

A law to prohibit railroads from collecting a Pullman surcharge in this state would probably be constitutional but is likely to prove ineffective because the surcharge has been ordered by the Interstate Commerce Commission under the authority of an Act of Congress.

To Hon. Alexander Young, Feb. 19, 1927.

Dear Senator Young:

You have submitted to me Senate Bill No. 385, entitled "A bill for an act to prohibit the railroads in the State of Colorado from collecting the Pullman surcharge on Pullman sleeper and chair car fares within the State," and have asked me for my opinion on the constitutionality of this proposed law.

I am of the opinion that the proposed law is not necessarily objectionable on constitutional grounds. However, I think it extremely doubtful whether the enactment of such a law would have the effect of permanently doing away with the Pullman surcharge in this state, for the reason that this surcharge has been ordered by the Interstate Commerce Commission, under authority of the Interstate Commerce Act as amended by the Transportation Act of 1920.

In the case of *Atlantic Coast Line R. Co. et al. v. Commonwealth,* a Virginia case decided June 17, 1926, and reported in 133 Southeastern Reporter, beginning on page 883 will be found a complete history of the Pullman surcharge beginning with its inauguration by the Director General of Railroads, June 10, 1918.

From an examination of the Atlantic Coast Line Case just referred to, it appears that many attempts have been made upon the part of states to escape this surcharge. Some of these attempts have been in the form of legislative acts, while others have been in the form of orders made by the state commissions.

As stated above, this surcharge was inaugurated by the Director General of Railroads during the period of governmental operation. Afterward the Director General revoked the surcharge upon complaint that it resulted in great inconvenience to the traveling public. Following the return of the railroads to private ownership on March 1, 1920, the railroads made application to the Interstate Commerce Commission for authority to increase passenger fares, etc., and after a hearing and thorough investigation the Interstate Commerce Commission authorized certain increases in passenger fares and a surcharge upon passengers in sleeping and parlor cars. This decision of the Interstate Commerce Commission is entitled Ex parte 74, In the Matter of the Application of Carriers, etc., for authority to increase rates and is found in Volume 58, Interstate Commerce Commission Reports, beginning on page 220. The decision was rendered July 29, 1920. Of course, this surcharge as ordered by the Interstate Commerce Commission at that time applied only to inter-

state rates. But since that time, in one way or another, the surcharge has been put into effect in all the states in reference to intrastate passenger traffic.

In the brief examination that I have found time to make, I have found the following attempts on the part of several states to repeal this surcharge:

In Volume 29, Interstate Commerce Commission Reports, page 290, in the matter of rates, etc., in the State of New York, the New York Public Service Commission had refused to put into effect the I. C. C. passenger fares and surcharges as laid down in Ex parte 74, 58 I. C. C. R. 220, above referred to. The railroads of New York filed a petition with the Interstate Commerce Commission for the purpose of having the interstate fares and surcharges applied to intrastate passenger business and the Interstate Commerce Commission ordered these fares and surcharges put into effect between points in the State of New York.

In Volume 59, I. C. C. R. 350, in the matter of intrastate rates within the State of Illinois, the State of Illinois had a two-cent passenger fare law which had been suspended during governmental control of the railroads. Following Ex parte 74, *supra*, the railroads applied to the Illinois Public Utilities Commission for like increases in intrastate rates in Illinois. This the Illinois Commission refused. The railroads then went into the United States Courts and obtained an injunction restraining the enforcement of the Illinois two-cent law. They also went before the Interstate Commerce Commission and it ordered the intrastate rates increased to correspond to the interstate rates.

In Volume 60, I. C. C. R. 290, South Carolina fares and charges, South Carolina had a three-cent fare. After the decision of the Interstate Commerce Commission in Ex parte 74, *supra*, the railroads applied to the railroad commission of South Carolina for an increase in passenger rates which was refused but the Interstate Commerce Commission, upon application to it by the railroads, ordered the increase.

In Volume 60, I. C. C. R. 362, North Carolina fares and charges, the North Carolina corporation commission had refused to grant an increase in passenger fares to correspond with those prescribed in Ex parte 74, *supra*, but this increase was granted by the Interstate Commerce Commission.

In Volume 62, I. C. C. R. 153, surcharge, etc., in the State of Alabama, the Alabama Public Service Commission had ordered the discontinuance of the surcharge. After a hearing the Interstate Commerce Commission ordered it put back on intrastate business.

In Volume 69, I. C. C. R. 623, surcharge, etc., in sleeping or parlor cars between points in the State of Georgia, the rates prescribed in Ex parte 74, *supra*, went into effect in Georgia with the approval of the Georgia Commission. Later this commission

after a hearing ordered the cancellation of the surcharge. Upon petition filed by the railroads with the Interstate Commerce Commission that body ordered the surcharges restored in Georgia.

In Volume 95, I. C. C. R. 469, the Interstate Commerce Commission had before it the question of the propriety and reasonableness of the surcharge and of the rates of the Pullman company for the accommodation of passengers in sleeping and parlor cars throughout the continental United States. This question arose upon an investigation instituted by the commission itself. After a hearing and investigation the Commission found on January 26, 1925, that the surcharge was not unreasonable.

The increased rates and surcharges prescribed in Ex parte 74, 58 I. C. C. R. 220, hereinbefore referred to, went into effect on intrastate travel in North Carolina in 1920, and remained in effect until 1923 when they were abolished by the legislature of that state. The steam railroads operating in North Carolina filed a petition with the Interstate Commerce Commission asking for an investigation. This investigation was ordered, and I append hereto a copy of the report of the commission in full.

In the Atlantic Coast Line Case, 133 Southeastern Reporter, 883, referred to in the beginning of this opinion, the Virginia State Corporation Commission, in a proceeding instituted by it against the railroad company ordered the discontinuance of the intrastate Pullman surcharge. At the hearing before the Virginia Commission the railroad introduced evidence in its own behalf, but no evidence was introduced on the part of the state. From the order of the Virginia Commission the railroad appealed to the Supreme Court of Appeals of the State of Virginia. The holding of the Virginia court will be seen from the following paragraphs of the syllabus of that case.

> "1. Pullman surcharge, authorized by Interstate Commerce Commission under Interstate Commerce Act, Sec. 15a, as added by Act Feb. 28, 1920, Sec. 422 (U. S. Comp. St. Ann. Supp. 1923, Sec. 8583a), *held* not invalid as additional tax exacted by Pullman Company without giving anything of value in return, being collected by it for carriers as part of transportation charge."
>
> "2. That Pullman Company is under contract to pay railroads for hauling Pullman cars, *held* not to authorize removal of intrastate Pullman surcharge by State Corporation Commission."
>
> "3. State Corporation Commission cannot reduce intrastate fares below general level of interstate rates by ordering removal of intrastate Pullman surcharge, as to do so would break down interstate rates established by Interstate Commerce Commission under Interstate Com-

merce Act, Sec. 15a, as added by Act Feb. 28, 1920, Sec. 422 (U. S. Comp. St. Ann. Supp. 1923, Sec. 8583a.)''

''4. Interstate Commerce Act, Sec. 13, pars. (3), (4), as amended, and section 15a, as added by Act Feb. 28, 1920, Secs. 416, 422 (U. S. Comp. St. Ann. Supp. 1923, Secs. 8581, 8583a), give Interstate Commerce Commission power to regulate intrastate commerce only so far as necessary efficiently to regulate interstate commerce under Congress' paramount power, and state authorities may deal with intrastate rates on general level which commission has found fair to interstate commerce.''

''7. Interstate Commerce Commission, acting under Congress' paramount authority, occupies entire field pertaining to interstate commerce, thereby ousting state jurisdiction to control intrastate transportation in manner resulting in unjust or unreasonable discrimination against interstate commerce.

''8. Where commonwealth offered no evidence and carriers' evidence did not support State Corporation Commission's order eliminating intrastate Pullman surcharge, worth $100,000 annually to carriers, such order is void as taking property without due process.''

The closing paragraph of the decision in the Atlantic Coast Line Case is:

''For the foregoing reasons, we will enter an order here reversing and annulling the order of the Virginia State Corporation Commission removing the surcharge, * * * and further authorizing the carriers to collect the same Pullman surcharges intrastate as they are now collecting on interstate transportation in Virginia.''

The authority of the I. C. C. to regulate intrastate rates is found in paragraph 4 of Sec. 13 of the Interstate Commerce Act as enacted in Sec. 416 of the Transportation Act of 1920, and as interpreted by Chief Justice Taft in the case of *Wisconsin R. R. Comm. v. C. B. & Q. R. R. Co.*, 257 U. S. 563. This par. 4 reads:

''Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be

> unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

From the foregoing references, I think it is clear: (1) that the I. C. C. has the power to order the Pullman surcharge intrastate in Colorado; (2) that the I. C. C. is fully committed (at least for the present) to the surcharge in interstate commerce and (3) that the I. C. C. has thus far manifested no inclination to consent to the removal of the surcharge in intrastate traffic.

If this bill should be enacted by the Colorado General Assembly, and if the railroad companies should then seek relief against it, either before the I. C. C. or in some court proceeding, in my opinion the surcharge would be restored, *unless* the State could show that the removal of the surcharge *does not* cause "any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." In the Wisconsin Rate Case, 257 U. S. 563, *supra,* it is said (par. 3 syllabus):

> "The effective operation of the Transportation Act reasonably requires that intrastate traffic over the lines of interstate carriers pay a fair proportionate share of the cost of maintaining an adequate railway system."

In other words if it appeared that the removal of the surcharge materially interfered with the interstate passenger rate structure, as established by the I. C. C., the surcharge would be reinstated.

I am not advised as to the meaning of the expression "chair car fares" in this bill. If reference is had to the so-called parlor car seats, for which extra fares are charged in the southern part of the state, it is my understanding that such extra fares are entirely intrastate and are collected by the railroads on their own initiative, independent of any authority from the I. C. C., in which event, I see no reason why the General Assembly may not legislate upon the subject. It is possible, however, (and this is merely a suggestion, and not an expression of opinion) that if

these extra fares were abolished the railroads would still have a right to apply to the State Public Utilities Commission for a hearing and a restoration of the extra fares. In any case, the railroads would not be obliged to carry these parlor cars.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

OLIVER DEAN,
Assistant Attorney General.

24. STATE PENITENTIARY

To Senator Durfee, Feb. 18, 1927.

The Board of Corrections has power to purchase real estate and to make improvements at penitentiary.

Convict-made goods may be used by the penitentiary and the surplus disposed of to other state institutions or may be disposed of to the public by dealers under a prohibitive license fee, which reduces competition with free labor to a minimum. (Secs. 766, 768, 780; Secs. 3745, 3749; Sec. 783.)

25. STATE PENITENTIARY

To Boone Best, Feb. 24, 1927.

The admittance of visitors to the State Penitentiary, under Sec. 776, C. L. 1921, is largely within the discretion of the Warden.

26. CITIES AND TOWNS

To Mr. R. A. Daugherty, Feb. 25, 1927.

The question of submitting the question of accepting civil service to the qualified electors at the next city election for city officers, would require 15 days' notice.

27. UNIVERSITY OF COLORADO

To Maurice H. Rees, Feb. 25, 1927.

All individual claims against the University shall be audited by the Board of Regents, and paid by warrants drawn by the president and countersigned by the secretary. This would apply to all departments of the university, including the School of Medicine.

28. SCHOOLS

To F. A. Ogle, Feb. 25, 1927.

In changing classification a school district does not lose its right to its allowance for high school teachers under Secs. 8446, et seq., C. L. 1921 (Minimum Salary Law).

29. DENTISTS

To Wm. H. Flint, Feb. 26, 1927.

In the event of the death of a patient of a dentist, whether death resulted from effects of a local or general anaesthetic, or from any other cause, the dentist must report the death to the chief health officer or coroner for investigation and certificate of death.

If a licensed physician was called in consultation before the patient's death, such physician may sign the death certificate.

30. ELECTIONS

To Joseph Tureck, Feb. 28, 1927.

The withdrawal of a candidate designated for a certain office should be accepted provided it is filed in writing prior to ten days before a primary election.

31. MILITARY DEPARTMENT

To Hon. Wm. H. Adams, March 1, 1927.

Real estate which has become unsuitable for military purposes may be sold, after due action by the board at a regularly called meeting, and after appraisal by a board of three appraisers appointed by the governor.

32. SCHOOLS

To J. H. Teagarden, March 1, 1927.

Expenditure of funds for permanent heating of building used at times for quasi-school purposes, but not belonging to district, is not approved.

33. TAXATION

To R. O. Throckmorton, March 1, 1927.

Under Sec. 7461, C. L. 1921, live stock owned in one county but grazing for part of year in another, cannot be assessed in both counties, but tax can be divided pro rata.

34. SCHOOLS

To Mrs. John Cameron, March 2, 1927.

A school election in which there has been no certificate of nomination filed nor any posting of names of candidates is nevertheless legal.

The records of a school board are public and open to inspection.

The tenure of service act applies only to school districts of the first class.

35. COUNTY TREASURER

To J. R. Patterson, March 3, 1927.

County treasurers have no authority to deposit public funds in a bank without protecting themselves by a good and sufficient bond and have no authority to accept any securities in lieu of such bonds.

Chapters 72 and 73, S. L. 1925, are in conflict and Chap. 73 controls.

36. LIEUTENANT-GOVERNOR

To George M. Corlett, March 3, 1927.

Under Sec. 14 of Art. 4, Const., the lieutenant-governor has power to vote in all cases in which the senate is equally divided.

37. SCHOOLS

To George A. Irvin, March 5, 1927.

The teacher's minimum salary law applies to high school teachers and to all school districts.

38. REAL ESTATE BROKERS

To Charles M. Armstrong, March 8, 1927.

Under Sec. 6517, C. L. 1921, a broker dealing in oil and gas leases is a real estate broker.

39. COUNTIES

To L. D. Blauvelt, March 9, 1927.

County commissioners may not purchase with county funds rights of way for highways within the limits of an incorporated town.

40. SOLDIERS' AND SAILORS' HOME

To Sen. Alex. R. Young, March 10, 1927.

In the absence of any statutory regulation, the manner of letting contracts for the erection of buildings for the Soldiers' and Sailors' Home would be under the direction of the board of directors of the home.

41. GAMES OF CHANCE

To S. A. Russell, March 10, 1927.

It would be unlawful to have card tables in a billiard hall for the purpose of playing for merchandise, as this has been held to be gambling.

42. TAXATION

To J. R. Seaman, March 12, 1927.

Under C. L. Sec. 7362 only those automobiles which have a continuity of business in two or more counties in the state are

public utilities and as such subject to assessment by the Tax Commission. All other bus companies which confine their activities to one county would continue to be assessed by the county assessors.

43. UNIVERSITY OF COLORADO

To Clark G. Mitchell, March 12, 1927.

The permanent Land Fund of the University of Colorado may not be invested in "down-town" property, but must be invested in accordance with the provisions of Sec. 8298, C. L. 1921.

44. ARCHITECTS

To Colo. State Board of Examiners of Architects, March 15, 1927.

Sec. 4689, C. L. 1921, provides for the issuance of a license to "any person" and does not refer to any company or corporation. At the end of the section it is provided that each member of a co-partnership must be licensed.

45. SCHOOLS

To E. J. Knight, April 18, 1927.

School district is not liable for professional services rendered pupil as a result of an injury sustained in school gymnasium.

46. CITIES AND TOWNS

To John R. Coen, March 23, 1927.

Elections in cities having a population greater than 5,000 must be governed by the provisions in the acts of 1911 and amendatory acts (Secs. 7636 to 7651 inc., C. L. 1921).

The boundaries for election precincts in cities for city elections shall be co-extensive with those in such cities for county elections. (Sec. 7656.)

47. LUNATICS

To Sterling B. Lacy, March 24, 1927.

Under Chap. 118, S. L. 1915 commitment to the State Hospital is not final but is considered as continuing in the committing court and the court has the right to reopen the case.

48. JUSTICE OF THE PEACE

To Adair J. Hotchkiss, March 25, 1927.

In the absense of statute, a justice of the peace has no power to grant a new trial or reopen a case.

49. CITIES AND TOWNS

Although Chap. 171, S. L. 1925, providing for a four-year term for certain municipal officers appears to violate Sec. 12, Art. 14 of the Colorado Constitution, public officials should nevertheless obey its terms until the courts pronounce it void.

To Reid Williams, March 25, 1927.

Dear Sir:

We have your letter of March 23, setting forth Section 12 of Article XIV of the Constitution, and parts of Chapter 171, Session Laws of 1925.

This office has had this question under consideration, and there seems to be some doubt whether or not the Act of 1925, found in Chapter 171, Session Laws of 1925, is constitutional, in so far as that Act provides a term of four years for certain municipal officers.

We respectfully call your attention to an opinion of the Supreme Court of this state in the case of *People v. Leddy*, 53 Colo. 109, 111, wherein the Court says:

> "As every enrolled bill, signed by the proper officers and lodged with the Secretary of State, however repugnant to the constitution, has the appearance, semblance and force of law, the general rule is, that public officials shall obey its terms until some one, whose rights it invades, complains, and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights."

It would appear, therefore, that public officials should follow the law until such a time as judicial power has pronounced the law void.

Trusting that the above and foregoing information answers your inquiry, we are,

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

WILLIAM W. GAUNT,
Assistant Attorney General.

50. TAXATION

To C. C. Hearnsberger, March 25, 1927.

When selling real estate for taxes, the county treasurer is required to include taxes, interest and charges assessed against the owner thereof on personal property. A mortgagee may, be-

fore sale, pay the taxes on the real estate only but after sale he can redeem only by paying the entire amount bid at tax sale.

The decision in the case of *County Commissioners vs. McDonald*, 78 Colo. 519 does not change this rule.

51. CORONER

To Charles Scheer, March 25, 1927.

The cost of transporting bodies from place of accident to county seat is a legitimate county expense and should be paid by county commissioners.

52. STOCK INSPECTION BOARD

To Foster Cline, March 26, 1927.

The Board of Stock Inspection Commissioners may not pay claim for money realized from sale of estrays after three years from date of sale.

53. SCHOOLS

To Flor Ashbaugh, March 28, 1927.

Sec. 8325, C. L. 1921, is no longer applicable to election of directors in first class school districts, being superseded by Sec. 8324.

54. TAXATION

Vacant lots owned by charitable organizations are not exempt from taxation unless they are actually used for some one of the purposes recognized in the constitutional and statutory exemptions from taxation.

Buildings owned by the Denver Press Club are not exempt from taxation.

Laws exempting charitable and educational institutions from taxation should be liberally construed.

To E. B. Morgan, March 29, 1927.

Dear Sir:

Your inquiry of March 3, 1927 as to the construction of Section 5 of Article X of the Constitution and Section 7198, C. L. 1921, together with letters of Clem W. Collins, Manager of Revenue of the City and County of Denver of date of September 7, 1927 addressed to the State Tax Commission, of J. A. Marsh, City Attorney of date of November 24, 1922, addressed to the State Board of Equalization, of Rice W. Means, City Attorney, of date of February 19, 1924, and Henry E. May, City Attorney, of date of December 27, 1926, both addressed to Clem W. Collins, Manager of Revenue, received.

The questions presented will be discussed in the following order:

1. Are lots without buildings thereon owned by charitable and religious organizations exempt from taxation?

2. Is the building of The Denver Press Club exempt from taxation?

3. Are laws exempting charitable institutions from taxation liberally or strictly construed?

(1) ARE LOTS WITHOUT BUILDINGS THEREON OWNED BY CHARITABLE AND RELIGIOUS ORGANIZATIONS EXEMPT FROM TAXATION?

With the contention that lots owned by religious or charitable organizations are exempt from taxation, whether they happen to have buildings upon them or not, this office does not agree.

The claim advanced in these letters that the comma which appears in the section of the Constitution above referred to, and which is absent from the statute, has some bearing does not hold good upon analysis.

Section 5 of Article X of the Constitution says:

> "Lots, with the buildings thereon, if said buildings are used solely and exclusively for religious worship, for schools, or for strictly charitable purposes, also cemeteries not used or held for private or corporate profit, shall be exempt from taxation, unless otherwise provided by general law."

Section 6 of the same Article says:

> "All laws exempting from taxation, property other than that hereinbefore mentioned shall be void."

And Section 7198, Compiled Laws of 1921, in so far as it is applicable, says:

> "The following classes of property shall be exempt from general taxation, to-wit:
>
> * * * *
>
> Second. Lots with the buildings thereon, if said buildings are used exclusively for religious worship.
>
> * * * *
>
> Third. Grounds with the buildings, thereon if said buildings are used exclusively for schools, other than schools held or conducted for private or corporate profit.
>
> * * * *
>
> Fourth. Lots with the buildings thereon, if said buildings are used for strictly charitable purposes."

An examination of the sentence structure of the constitutional provision shows that only lots which have buildings thereon and which buildings are used solely and exclusively for religious worship, for schools or for charitable purposes are exempt. Starting with the word "lots" and leaving out all of the language

which modifies the word "buildings," leaves the section reading as follows:

> "Lots, * * *, shall be exempt from taxation, unless otherwise provided by general law."

The incongruity of such a construction is apparent. Such a reading of the section would make any lot in the State of Colorado, regardless of its character or ownership, exempt from taxation. This leads to the conclusion that only lots upon which buildings are constructed and which are used for the particular purposes mentioned come within this provision of the Constitution.

The three subdivisions quoted from the statute in question point to the same conclusion, by providing in each instance that lots or grounds with the buildings thereon, if said buildings are used for certain defined purposes, are exempt.

In this connection, however, it should be suggested that land which is immediately appurtenant to that upon which the foundations of the buildings rest, and which is obviously held only for the purpose of affording light and air to the buildings, or which is necessary to the enjoyment of the use of such buildings, should likewise be included within the terms of the exemption. For example, it would undoubtedly be conceded that the playgrounds immediately surrounding a school, or lots which go to make up a churchyard and from whence the church edifice necessarily acquires its light and ventilation should be included in the exemption. But the exemption of vacant lots immediately adjacent to and appurtenant to churches and charitable institutions should not be permitted to extend further than the very needs of the occupancy of the buildings require.

> "An exemption of a church building from taxation includes as incident thereto not only the land actually covered by the buildings, but also the land around it reasonably necessary for convenient ingress and egress, light and air, and proper and decent ornamentation. It does not, however, include land, even though adjacent to the church building, not reasonably used for the convenient enjoyment of the building as a church, whether vacant or leased for business purposes."
>
> "A college or academy may own extensive grounds used for walks, lawns, gardens and the like for the benefit of its own pupils which will not be subject to taxation, and the same is true of fields for baseball, football and other athletic sports." 26 RCL 322; *Monticello Seminary vs. People,* 106 Ill. 398, 46 Am. Rep. 702.

This office does not agree with the Denver Assessor in his claim that a lot belonging to an institution in a case such as the

instance of the Highland Masonic Building Association presents should be regarded as exempt. It appears from Mr. Collins' letter that this association had purchased a block of ground some distance from the building which it then occupied for the purpose of erecting a lodge building thereon some time in the future. The lodge was required to pay taxes on this block during the time that it was vacant. This was right. Under the provisions of the Constitution, and the statute mentioned above, this block clearly would not come within the exemptions.

Therefore, when the association commenced the erection of a temple on this block he was in error in refunding the taxes theretofore paid by the association upon such block.

The necessity of paying taxes upon certain property during a given period is determined by the character of the property or its use during that period. And prior to the construction of the temple the block either was subject to taxation or it was not, and no change in the manner of its use in a subsequent year could in any manner affect the right of the state and the county to its taxes during the previous period.

No case has been found in Colorado to uphold the theory that property of this character is exempt from taxation where it is not actually in use for some one of the purposes recognized in the constitutional and statutory exceptions.

In *Cathedral St. John vs. County Treasurer*, 29 Colo. 143, it was held that certain lots and the buildings thereon which were used for school purposes were exempt from taxation, although the Bishop who was also an instructor in the school, resided with his family in the building.

In the case of *Bishop and Chapter vs. Treasurer*, 37 Colo. 378, which is known as the Oakes Home case, where it was held that a home for consumptives was exempt from taxation, the property consisted of lots with buildings used exclusively for the purposes of the home.

The court laid down this rule in its opinion:

> "The character of the institution is to be determined by the purpose of its construction and the manner of its operation."

In the recently reported case of *The Board of County Commissioners of Rio Grande County, et al. vs. San Luis Valley Masonic Association*, 250 Pac. 147, a park was established wherein lots were leased to members upon which the members might build summer homes. It was used for "Masonic purposes, including fraternal, pleasure and recreation." The objects were practically the same as those outlined by the taxpayer in the case of *Horton vs. Colorado Springs Building Society*, 64 Colo. 629, referred to in Mr. May's letter.

The court, in the Rio Grande case, said:

"While the use of a tract of land or park with buildings thereon for strictly charitable purposes may be unusual and out of the ordinary, we know of no reason why they may not be so used."

"When a religious society has bought a lot for the purpose of erecting a church thereon and has begun and is prosecuting with all reasonable diligence the erection of the building, the lot is generally held to be exempt from taxation. But a lot of land bought by a religious society with the intention of erecting a house of worship thereon in the immediate future is not exempt."

26 RCL 324; *All Saints Parish v. Brookline,* 178 Mass. 404, 59 N.E. 1003; *Enant v. McGuire,* 36 La. Ann. 804, 51 Am. Rep. 14.

See 37 Cyc. 398; *Foy v. Coe College,* 95 La. 689; 64 Mo. 636.

State v. Kansas Educational Assn., 54 Kan. 547; 38 Pac. 796.

The conditions set forth in the letter of Mr. Marsh would appear to bring the lots of the Trinity Community Association, a subsidiary corporation of the Trinity Methodist Episcopal Church within the exemption. In that case the property had been owned by the church corporation, but for convenience in administration the title had been transferred to the community association.

The property was still used for charitable and community purposes and no good reason would appear for saying that this property was not exempt. The character of its use was apparently as religious and charitable as that of the actual church edifice. A very clear distinction is to be noted between this property which was given over to actual church uses and the vacant lots belonging to a church or lodge and standing some distance from its main buildings.

(2) IS THE BUILDING OF THE DENVER PRESS CLUB EXEMPT FROM TAXATION?

The question presented by the Denver Press Club petition is more difficult of solution. At the outset it should be suggested that the answer to all such applications should be given only after a consideration of the circumstances surrounding each particular case.

Cathedral St. John vs. County Treasurer, 29 Colo. 143.

And where the determination of the question of the right to an exemption under the constitutional provisions and the exceptions named in that statute, is as close as it is under the interpretations placed thereon by our court, then it would seem well

for the Tax Commission in case of any doubt to refuse to grant the petition and to require each petitioner to establish his right to exemption in court.

The petition of the Press Club, according to Mr. May's letter, would seem to parallel the language used by the Supreme Court in the cases of *Horton vs. The Colorado Springs Masonic Building Society*, 64 Colo. 529, and *The Board of County Commissioners of Rio Grande County, et al., vs. The San Luis Valley Masonic Association,* 250 Pac. 147.

On the face of its contentions the Press Club might seem to have almost as good a claim to exemption as did the taxpayers in either of those cases. But the test, as laid down in the Horton and the Oakes Home cases, is "the character of its construction and the manner of its operation."

It is claimed that the Press Club is organized, not for gain or benefit, but to promote good fellowship among the newspaper workers of Denver and to do charitable work not only among its needy members but in the city at large. It has no stock outstanding and was financed largely by donations. Its income is derived from initiation fees, dues and donations, and after operating expenses are paid "any balance is available for such relief and charitable work as may be done by the organization."

It has a standing committee whose members are charged with the duty of visiting sick members and aiding them. It teaches respect for government, obedience to constituted laws and the like, and what it does in the way of charity is done voluntarily.

In the Horton case, the charitable character of the Masonic organization was recognized as the main purpose of the institution and the presence of a book store and cigar stand from which some small profit was derived was considered as incidental. And in the case of *Cathedral St. John vs. County Treasurer, supra,* where the fact of the use of a portion of the building for the household needs of the Bishop and his family was urged as grounds for taxing the property and denying the claim for exemption, the court said:

> "So that a use incident to the main purpose for which the property is held is not one which falls within the prohibition of the statute."

In those cases the court found that the educational and charitable purposes were the fundamental aims of the institutions and refused to permit an incidental use to be used to defeat the main purpose.

But the danger under this petition would seem to be that the incidental purpose is being confused with the dominant one.

The Horton case in quoting the above sentence called attention to the fact that the rule as to cases involving educational and charitable purposes is the same.

The point we wish to make is that, while petitions may be presented to you from time to time, wherein it is made to appear that the extremely liberal doctrine recognized in the cases above cited is applicable, it would seem to be the wiser plan to ask the taxpayer to bring himself within the exemption by proving that a charitable purpose is the underlying reason for the property's existence. Where "operating costs are paid for by the revenues, and under the by-laws any balance is available for such relief and charitable work as may be done by the organization," there is room for doubt as to whether the dominant use of the property is for charity.

It would seem that before the property of this Press Club should be regarded as having been dedicated to charitable purposes, some definite and substantial provision for charitable work should have been made, rather than to merely provide that the balance of its funds, if any, should be dedicated to such use. There here seems to be a distinction sufficient to justify you in denying the petition. A careful reading of the statement leads to the inevitable conclusion that the charitable work is merely incidental to the comfort and benefits of the members, and that the property of this club should be regarded as subject to taxation until the courts shall determine otherwise.

(3) ARE LAWS EXEMPTING CHARITABLE INSTITUTIONS FROM TAXATION LIBERALLY OR STRICTLY CONSTRUED?

You state that it has always been your understanding that laws exempting property from taxation shall be strictly construed. That is the general rule. 26 RCL 316.

But the courts generally have come to recognize an exception in the case of educational institutions, at least. And in this state the courts have included charitable institutions within the exception, and declared that this rule of strict construction does not apply in this jurisdiction.

In *Cathedral St. John vs. County Treasurer*, *supra*, it was said:

> "The solution of the question presented by counsel for appellant depends upon a construction of the constitutional and statutory provisions above quoted. The general rule is, that exemptions from taxation are strictly construed, but this rule is not applied with full vigor to the character of exemptions under consideration. In other words, provisions exempting property used for educational purposes are less strictly construed than those exempting property used for ordinary gain or profit."

In the Horton case the court quoted this clause and then said:

> "While this case involved the exemption of property used for educational purposes, the rule pertaining to property used for charitable purposes is the same, and was thus recognized in *Bishop and Chapter vs. Treasurer*, 37 Colo. 378 (known as the Oakes Home Case), wherein it is said that a charity as regards the character of the work to be performed, includes whatever will promote in a legitimate way the comfort, happiness and improvement of an indefinite number of persons."

The court then calls attention to the fact that the same liberal rule was followed in *Seminary v. Arapahoe County*, 30 Colo. 507.

The argument in favor of such a liberal construction is thus stated in the Horton opinion:

> "This has been suggested in relation to exemptions of religious, charitable and educational institutions, on account of their meritorious nature and the fact that they relieve the government of burdens which it would otherwise have to bear."

And so that no doubt of the extreme liberality of the Colorado rule may remain the court during last October handed down its opinion in the case of the *San Luis Valley Masonic Association, supra*, in which it relied upon the doctrine of the Horton case and added:

> "Following the rule of liberal construction adopted in this jurisdiction, it seems quite clear that the property in question was exempt from taxation."

In view of the breadth of this rule the danger that much more property will be added to that already claimed as exempt is apparent. It is again suggested that in case of doubt your course should be to relegate to the courts the question as to whether or not a petitioner is entitled to exemption from taxation.

Hoping that the above may aid you in the solution of the problems.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

RALPH L. CARR,
Assistant Attorney General.

55. MILITARY DEPARTMENT

To the State Military Board, March 29, 1927.

In the absence of an executive order of the Governor assigning the Adjutant General to duty, and since the statute (National Guard Act, 1921) contains no specific provision for payment of

salary to the Adjutant General, the validity of a claim for unpaid salary would be doubtful, and should be determined by the courts. See *McGinnis v. Newlon,* 82 Colo. 228.

56. TAXATION

To W. B. Nichols, March 30, 1927.

One who holds a tax certificate is entitled to a tax deed after the expiration of three years from the date of the tax certificate, regardless of whether or not the taxes have been paid for the years intervening between the date of the tax certificate and the date when the certificate owner is entitled to a tax deed.

57. INDUSTRIAL SCHOOL FOR BOYS

To Mr. Claude D. Jones, March 30, 1927.

There is no appeal from nor review of decisions of the Board of Control of the State Industrial Schools upon matters entirely within their discretion.

58. CITIES AND TOWNS

To Goodale & Horn, April 1, 1927.

Only those who have paid a property tax in the year preceding an election for the issuance of bonds for a municipal hospital are entitled to vote for the creation of such a municipal debt.

59. PUBLIC HEALTH

To S. R. McKelvey, April 1, 1927.

Chiropractors may diagnose or treat communicable diseases but must conform to the act regulating the practice of chiropractic.

60. TAXATION

To Robert H. Schaper, April 1, 1927.

Under Sec. 7422, C. L. 1921, the Board of County Commissioners has authority to assign tax certificates for such sum as the board may determine, by resolution duly recorded, and distribution made as if the entire amount of tax had been collected.

61. JUSTICES OF THE PEACE

To Henry Grubbs, April 2, 1927.

Justices of the Peace have no right to grant a new trial or issue writ of error *coram vobis.*

62. MOTOR VEHICLES

To C. M. Armstrong, April 2, 1927.

The Motor Vehicle Supervisor has no power or authority to refund excessive license fees paid in previous years.

63. **SCHOOLS**

To Mrs. Myrtle DeFoe, April 2, 1927.

Non-contiguous lands may not be joined in one district.

64. **SCHOOLS**

To J. R. Bullard, April 2, 1927.

Secretaries and treasurers of school boards are required to make report of financial condition of district whenever called upon by the board.

65. **SCHOOLS**

To Mark Lange, April 4, 1927.

Secs. 8350 and 8351 requiring annual publication of financial statement of school district, and imposing fine for failure or neglect to publish are not self-executing. Publication can be compelled only by mandamus. Penalty can be imposed only by complaint and prosecution.

66. **SCHOOLS**

To Mr. C. B. Prost, April 4, 1927.

There is no law in this state prohibiting payment of tuition to one district by another district.

A school population of 31 entitles a district to pay from the General Fund for only one teacher's salary.

67. **SCHOOLS**

To Mrs. Lura Hammond, April 6, 1927.

The question of the consolidation of school districts may be submitted to a vote of the electors by the school boards upon their own motion or pursuant to a petition.

68. **ROCKY MOUNTAIN NATIONAL PARK**

By ceding to the United States jurisdiction over the Rocky Mountain National Park the state would lose the right of control over the water therein unless the act of cession contained adequate saving clauses.

To Hon. N. C. Warren, April 6, 1927.

My Dear Senator Warren:

Replying to your inquiry relative to whether or not the report of the Committee on State Affairs and Public Lands made on April 1, respecting House Bill 164, and reported at Page 4, Senate Journal, 87th day, adequately protects the present and future development for irrigation and domestic purposes in the Rocky Mountain National Park, it affords me pleasure to say:

Rights to the control of water are in the jurisdiction of the state but would pass with the act of cession unless adequate

saving clauses are inserted. Rights of way over the government lands included within the park are not the property of the state and must be obtained from the United States. A complete water project when crossing the public domain requires a grant of water from the state and a grant of right of way from the United States for the construction of the works for the use of the water. Rights of way not being within the jurisdiction of the state cannot be protected by saving clauses but must be obtained through agreement between the state and the United States by reciprocal legislative acts. All provisions of the Act of our legislature later accepted by an act of Congress would become an agreement or compact.

PRESENT DEVELOPMENT

The bill, as amended and embodied in the report of the Senate Committee, protects State jurisdiction over waters within the Rocky Mountain National Park. This is covered by the saving clause:

> "Saving, further, to the said State jurisdiction under its laws over the uses, control, protection and disposition of the waters of the streams arising within said park."

But the right to use and control water is useless unless those who have a right to control the water also control the instrumentalities by which the use is made. In other words, the right to use water is of no avail unless there is a ditch or other appliance with which to make the use and this involves the use of the lands traversed by the ditch which, in this case, belong to the United States.

The amendments reported by the Committee of State Affairs and Public Lands reserve present and future jurisdiction over the uses of water but only provide for rights of way over lands for present uses of water.

FUTURE USES

The amendments proposed by the Committee make no provision for rights of way for future development of water supplies of the territory included within the Rocky Mountain National Park. While Section 1 reserves control over the waters of the streams within the Park, it only protects rights of way for present appliances and makes no provision for future construction.

One or more of the most feasible tunnel sites in Colorado for diversion of Colorado river waters to our eastern slope, are situate under and across the area included within the Rocky Mountain National Park. Future domestic and irrigation demands of this state will require the building of these tunnels.

If not constructed, state development will be correspondingly retarded.

The Colorado river is an interstate stream. The greatest demand is along its lower reaches. While it has its source in this state, lower states, which furnish little of the water, already press adverse claims against the water supplies in this state and threaten to enjoin the building of any tunnels through the continental divide in Colorado. This condition will not improve with time. While the amount of water which may be so diverted is negligible when compared with the enormous flow of the river, this does not prevent those in the lower states from unduly magnifying the possible extent of our diversions. This human element will always obstruct, if not prevent, the enactment of special legislation by Congress to permit us to build tunnels, and conditions will grow worse with time.

Present law forbids the granting of rights of way for construction of irrigation or domestic works across national parks without authority by special act of congress in each case. Our chances of securing such legislation are meager. At best, it would only be secured after years of lobbying and propaganda involving endless expense and strife. While Congress has granted rights of way for the building of some few structures in Yosemite and other national parks, in no case do such structures involve interstate rivers. They apply purely to local conditions within the state in which the park is located and do not afford any precedent or give any assurance of similar treatment by Congress for rights of way for intermountain tunnels.

The lands originally included within the Rocky Mountain National Park were public lands of the United States and within the control of Congress. Congress dedicated the lands to park purposes and has proprietary control over them but has no police jurisdiction. It is proposed that the state cede all its jurisdiction over the area included with the Park, with the few exceptions noted in the bill. This matter of cession presents to the Legislature the duty of determining important matters of public policy as regards future development of our state resources. The issues are (1) shall Colorado follow lines of least resistance and temporary expediency and passively cede jurisdiction over the park to the United States, leaving all matters of future development to the mercy of Congress, including the Congressmen and Senators from the lower Colorado River states, or (2) shall Colorado raise the issue of establishing a permanent policy regarding necessary rights of way for future construction by agreement with the United States through reciprocal legislation?

(1) If it is desired to proceed in harmony with the first of these propositions the bill as reported by the Senate Committee needs no further amendment.

(2) If it is desired to settle the issue by requesting of Con-

gress that the state and the United States agree upon a permanent policy regarding necessary rights of way over lands of the United States included within the Park as a part of the transaction of cession, a further section should be added to the bill phrased substantially the same as Section 2 of the bill as passed by the House (see House Journal March 19, 14th day, page 9).

The laws of the United States respecting rights of way for the construction and operation of works for irrigation and domestic purposes, are quite involved and require brief discussion for an understanding of Section 2 as passed by the House.

Rights of way over public lands and forest reservations of the United States for canals, ditches and reservoirs are acquired by the filing of maps and field notes with the Secretary of the Interior in conformity with Sections 18-21, of an Act of Congress approved March 3, 1891 (26 Stat. 1095) and Section 2 of an Act approved May 11, 1898 (30 Stat. 404). Upon the filing and approval of the maps a permanent right of way is acquired for the structures, indicated on the plats, to the extent of the land occupied by the structures together with lateral margin of 50 feet on each side.

The lands included within the Rocky Mountain National Park were part of the national forest at the time the park was created and had the park not been created rights of way could now be acquired across the area in question by simple compliance with the Acts of 1891 and 1898.

The right of way so obtained is permanent as distinguished from revokable licenses and is in the nature of a limited or qualified fee. It can only be taken away by proceedings in forfeiture where the grantee ceases to use the property for the purpose indicated. This is the character of title necessary to the construction of works for domestic or irrigation purposes. It is necessary because the uses are perpetual and the enormous cost of the works forbids such expenditures upon faith of mere revokable licenses.

The House amendment provides that the United States be requested to agree with the State of Colorado that permanent rights of way shall be granted across the park of the same character as those granted by the acts above mentioned, thus to avoid the necessity of securing a special act of Congress authorizing the building of each ditch, pipe line, tunnel or other work in any way touching, crossing or passing under the national park.

March 3, 1921, Congress passed an Act providing that no ditch, canal or other structure for domestic or irrigation purposes shall be constructed across, through or under any of the lands included within any National Park except by authority of a special Act of Congress. This is the present law and the presumption is that it will not be modified to make it less harsh in any of its provisions.

Prior to the enactment of the 1921 Act, above mentioned, rights of way might be acquired across national parks under the Act of February 15, 1901 (30 Stat. 790). This Act authorized the Secretary of the Interior to grant permission for the construction of such works wherever not incompatible with the public interest but provided that permission so granted might at any time be revoked in the discretion of the Secretary or his successor and that such permission should not "confer any right, or easement, or interest in, to, or over any public land, reservation, or park." No permanent right of way was granted but only a revokable license of a nature impossible of use in the construction of permanent works involving the expenditure of large sums of money. It was this Act of 1901 (see 50 L. D. 388 and 569) which Congress mentioned in Section 2 of the Act creating the Rocky Mountain National Park wherein it is provided that that Act shall be and remain in full force and effect within the area. Whether or not the Act is still effective in the park is an open question. The courts would construe it to have been repealed. But even if applicable and in full force and effect within the Rocky Mountain National Park it is of no value to Colorado because the permission given is a mere revokable license and not a permanent right of way such as acquired for our purposes.

Many entertain the erroneous view that because this 1901 revokable license law is mentioned in the Act creating the Rocky Mountain National Park rights to future construction of irrigation and domestic works are protected. As we have observed, such views are ill-founded.

As already observed, two essential elements are required for the operation of an irrigation or domestic supply system (1) water rights and (2) rights of way for the construction, operation and maintenance of works to use the water. Water rights are protected in the present bill amended by the Senate Committee. The rights of way for present constructive works are also protected but *not* rights of way for future construction.

The Legislature may provide for permanent rights of way for future construction by agreement between the State and the United States that rights of way similar to those granted over Forest Reserves by the Acts of 1891 hereafter shall be granted across the Rocky Mountain National Park upon compliance with similar procedure. Such an agreement may be consummated by reciprocal legislation, viz: the legislation of the state requesting an Act of Congress agreeing to such a provision. This procedure was embodied in the phrasing of Section 2 of the bill as passed by the House. Considerable objection has been raised to the construction of reservoirs in the park and it may be wise to modify Section 2 of the House amendment by eliminating reservoirs as no large sites are involved.

Section 2 of the bill as it passed the House contains the provision:

> "This Act shall take effect if and when such an Act of the Congress shall have been approved."

The section without some such provision would be in the nature of request by Congress which might be either granted, refused or ignored, but the remainder of the Act of cession (by the State) would go into effect. In other words, without this sentence at the close of the section the whole matter would be left to the will of Congress to grant, refuse or ignore without impairing the effectiveness of the Act of cession or without settling the issue. If Congress either rejected or ignored the request the State would be worse off than at present because a rejection would amount to a flat declaration against the policy requested and if Congress were to ignore the presumption would be that it did not assent.

We are thus confronted with the fact that if the issue is raised at all it should be raised completely and by making the Act effective only upon favorable action by Congress. If Congress refuses to concede this reasonable request by Colorado the whole matter is left just as it is at present, the State has jurisdiction over the park and the rights of both the State and the United States are the same as they were before the State Act was passed. No one would be injured and Colorado would not have ceded territory. The whole matter may be acted upon by the next Legislature.

For your convenience we have prepared and attach hereto an amendment to the report of the Senate Committee embodying the phraseology of Section 2 as the bill passed the House but eliminating reservoirs from the operation of the bill.

In conclusion, we desire to call your attention to the fact that determination of such matters of permanent public policy, are solely within the keeping of the General Assembly and it is not the intent of this letter to do more than suggest. It is for the General Assembly to determine whether or not the park shall be ceded without any protective measures for rights of way for future construction. We believe the matter of sufficient importance to assure deliberate consideration.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

69. **BOUNDARIES**

To Ben L. Garman, April 6, 1927.

C. L. Sec. 5043 pertaining to the establishment of disputed boundaries has been impliedly repealed by Sections 298-309 of the Code of Civil Procedure.

70. **SCHOOLS**

To Mrs. C. E. Magowan, April 8, 1927.

Corporal punishment in moderation is not prohibited.

71. **ELECTIONS**

To Gust Westman, April 8, 1927.

A ballot marked in substantial compliance with statute should be counted.

72. **PENITENTIARY**

To Governor Adams, April 9, 1927.

If approved, S. B. 361 would prevent the penitentiary and reformatory from selling or offering to sell within the State any live stock or produce from the farms of said institutions, except such as might be sold to the State itself or to its institutions. (See *Hessick v. Moynihan,* 83 Colo. 43.)

73. **SCHOOLS**

To W. N. Ahern, April 11, 1927.

In annexing portion of school district to contiguous district no statutory provision prevents transfer of a part only of the land of a resident.

74. **CIVIL SERVICE**

To Civil Service Commission, April 11, 1927.

There is no provision of the constitution or the statutes or the rules of the Commission that would prohibit a person in the employment of the state from holding the office of councilman providing such membership would not impair his efficiency as a civil service employe of the State, but the charter of the City and County of Denver provides that "no member (of council) shall hold any other public office or employment . . . ."

75. **TAXATION**

To F. B. Webster, April 11, 1927.

A holder of a tax sale certificate by assignment from county must pay all subsequent taxes before becoming entitled to tax deed.

76. **SCHOOLS**

To Mary M. Young, April 11, 1927.

A county superintendent of schools may revoke and annul her own order annexing contiguous territory where same was done unlawfully, if no adverse rights have attached.

77. **SCHOOLS**

To Lenore N. Johnson, April 12, 1927.

A county superintendent may not revoke or annul action of predecessor, although former action was illegally done.

78. **SCHOOLS**

To Helen V. Buchanan, April 13, 1927.

Members of County High School Committee are not entitled to mileage on attendance at meetings of committee.

79. **ARCHITECTS**

To Richard Parry, Secy., April 13, 1927.

An applicant presenting a certificate from similarly constituted board of another state is entitled to a license in Colorado.

80. **SECRETARY OF STATE**

To Secretary of State, April 13, 1927.

Where a trademark is offered for registration in the office of the Secretary of State so similar to one already filed as to be likely to deceive the public, registration should be refused.

81. **CITIES AND TOWNS**

To W. H. Bradley, April 13, 1927.

Towns and cities have power to license, tax, regulate and prohibit theatres, bowling alleys, pool and billiard halls.

82. **INDUSTRIAL SCHOOL FOR BOYS**

To Samuel Chutkow, April 13, 1927.

Boys who are sixteen years of age or over are not eligible for commitment to the institution.

83. **STATE TEACHERS COLLEGE**

To H. M. Hornberger, April 13, 1927.

The matter of granting or withholding degrees is not a legal question.

84. **PENITENTIARY**

To Boon Best, April 19, 1927.

The power lies with the governor to parole a convict after the

expiration of his minimum sentence or to require the serving of the maximum sentence.

85. SCHOOLS

To Sherman Bolton, April 19, 1927.

Where part of one district is annexed to a contiguous district less than thirty days prior to annual election, the inhabitants of the territory transferred may vote in the district to which annexed provided they are qualified as to citizenship, age and residence in state and county.

86. SCHOOLS

To W. D. Blaine, April 20, 1927.

No specific statute covers annexation of Union High School District to County High School District, but this might be done under Sec. 8310, C. L. 1921.

87. SCHOOLS

To Sara I. Rhodes, April 20, 1927.

All district officers hold office until their successors are qualified. Sec. 8325, C. L. 1921.

88. COUNTY TREASURER

To C. R. Furrow, April 21, 1927.

County clerks depositing auto license fees with county treasurer under provisions of H. B. 101 amending Sec. 1357, C. L. 1921, are not required to pay commission to treasurer.

89. COURTS

To Moses & Ellithorp, April 22, 1927.

On action on cognovit note, clerk of court is entitled to plaintiff's docket fee of $7.50 and defendant's docket fee of $5.00.

90. SCHOOLS

To Nellie E. Fee, April 23, 1927.

Directors elected or appointed to fill vacancies hold only until next ensuing election and the qualification of their successors.

91. SCHOOLS

To K. M. Burrell, April 25, 1927.

Directors of third class district may not sell or lease school property without approval of directors.

A railroad may not condemn right of way over land of school district occupied for school purposes.

92. **ALCOHOL**

To Chas. M. Armstrong, April 25, 1927.

Under Sec. 4636, C. L. 1921, a manufacturer using alcohol at several plants, requires one license only.

93. **EMBALMING EXAMINERS**

To W. T. Hallowell, April 26, 1927.

The Board of Embalming Examiners has no power to adopt a rule requiring all applicants for examination to have a high school education or its equivalent.

94. **TAXATION**

To Fr. Benedict Pedratti, April 27, 1927.

A house owned by church organization, not used for school purposes, although purchased for such use at some future time, but at present rented as a residence, is not exempt from taxation under Sec. 5, Art. X, Constitution.

95. **SCHOOLS**

To Mrs. F. A. Washburn, April 27, 1927.

A school district is not authorized to expend public funds to aid a service corporation in building an electric line into neighborhood of school.

96. **CITIES AND TOWNS**

To H. W. Murray, April 29, 1927.

The mayor of a town has the right to vote upon the question of appointment of a marshal when the vote of the trustees is a tie.

97. **STATE TEACHERS COLLEGE**

To W. E. Johnston, April 29, 1927.

The Board of Control of the Teachers College at Greeley has no power to join in a petition for a municipal improvement such as the paving of the streets adjacent to the grounds of the institution.

98. **CITIES AND TOWNS**

To W. B. Bevard, April 29, 1927.

A city marshal holds office until his successor is appointed and qualifies.

99. **NOTARIES PUBLIC**

To C. E. Hadley, April 29, 1927.

A partner acting as notary public cannot take acknowledgments for the firm.

100. CITIES AND TOWNS

To Claude Cartwright, April 29, 1927.

City officers hold over until such a time as their successors are duly elected and qualified.

101. TAXATION

To E. B. Morgan, May 4, 1927.

In the case of cattle sold by one and purchased by another on April 1st of a certain year, the purchaser and not the seller is liable for the taxes.

102. TAXATION

To F. D. Hart, May 5, 1927.

Redemption from tax sale of lands sold to satisfy taxes levied under General Revenue Act and also under irrigation district statute, can be made only by payment of amounts due under both assessments.

Redemption from general tax alone, leaving irrigation district assessment unpaid, is not allowable under Colorado statute.

103. TAXATION

The gross value of ore for purposes of taxation under Sec. 7261 is determined by considering the total tonnage of the ore rather than the weight of the concentrates from such ore after treatment.

In deducting the expenses allowable under Sec. 7261 the word "or" in item eighth should be considered as meaning "and" so that costs of treatment, reduction and sale may all be deducted.

Concentrates from molybdenum ore kept on hand during the year are properly assessable but not under the terms of Sec. 7232 which applies only to manufacturing concerns.

To Edward B. Morgan, May 6, 1927.

Dear Sir:

An investigation of the questions involved in the above company's application to require an amended assessment of the company's contiguous mining claims in Lake County for 1926 as set out in the attached letter of Mr. Barney L. Whatley, attorney for the taxpayer, has been made by this office in response to your request under date of February 7th.

The grounds of complaint set forth in the summary of Mr. Whatley's letter are:

That there was error: First, in the determination of the gross value of the ore produced; Second, in the refusal to deduct selling cost in computing the gross proceeds; and, Third, in classing the taxpayer as a manufacturing concern and assessing it for concentrates kept for refining or purifying.

(1) WHAT IS GROSS VALUE OF ORE UNDER SECTION 7261, C. L. 1921?

The particular statute with which the first two grounds of objection are concerned is Section 7261, Compiled Laws of Colorado, which provides:

> "All mines and mining claims bearing gold, silver, lead, copper or other precious or valuable minerals and possessory rights therein classified under the laws of this state as producing mines shall be assessed annually for the purposes of taxation as herein provided:
>
> (a) Every person, or persons, corporations or association owning or operating any mines or mining claims which shall be a producing mine, as defined in Section 5618, revised statutes of Colorado, 1908, shall between the 1st and 15th days of January in each year, make out and deliver to the assessor of the county wherein such property is situate, a statement showing:
>
> First—The name of the mine or mining claim.
>
> Second—The name or names, of the owner, or owners thereof.
>
> Third—The number of acres contained in such mine or mining claims.
>
> Fourth—The number of tons of ore extracted during the preceding year.
>
> Fifth—The gross value of any such ore extracted, in dollars and cents.
>
> Sixth—The actual cost of extracting same from mine, which shall include cost of liability and workmen's compensation insurance, but shall not include the salaries of any officers or agents not actively and consecutively engaged in or about the mine.
>
> Seventh—Actual cost of transportation to place of reduction or sale.
>
> Eighth—Actual cost of treatment, reduction or sale.
>
> Ninth—The net proceeds, in dollars and cents, after deducting the above expenses.
>
> Which statement shall be signed and sworn to by such person or the superintendent or managing agent of such corporation or association.
>
> (b) The assessor, when he receives such statement, shall determine the gross proceeds of any such producing mine or mining claim for said preceding year, and shall, at the same time, determine the net proceeds as herein defined for said preceding year, and shall, for the purpose of assessment for taxation, value such pro-

> ducing mine, or mining claim at a sum equal to one-fourth of the said gross proceeds for said preceding year for any such mine or mining claims; Provided, however, That if the net proceeds as herein defined of any such producing mine or mining claim for said preceding year exceeds one-fourth of the gross proceeds as herein defined, then any such producing mine or mining claim shall be valued for the purpose of assessment for taxation at the amount determined by the assessor as the net proceeds for said preceding year for any such producing mine or mining claim; Provided, further, That any number of contiguous claims owned and operated as one property by the same person, persons, association or corporation, the gross production of which shall be more than five thousand dollars per annum, shall be deemed and considered to be one producing mine for the purpose of this Act."

It is contended that the assessor arrived at the gross value of the ore produced by using the number of pounds of finished products as the basis for his computation. If the assessor did pursue such a plan he did not follow the statute.

The gross production of the company's mines during 1926 was 93,061 tons. The taxpayer claims that the assessor based his gross value upon 821,737 pounds of concentrates after mill treatment.

In the case of *Standard Chemical Company v. Curtis, et. al.*, 77 Colo. 10, the company rendered a statement under the terms of Section 7261 above showing 6,021 tons of ore extracted from the company's mines with a value of $120,000. The assessor took the number of tons of concentrates which was 1,281 and fixed the value at $768,068. The court said:

> "The plaintiff based its tonnage, as returned in its schedule, on the quantity of ore actually extracted and delivered to the surface, at the mouth of the mine, whereas the assessor took the tonnage of concentrates, after the ore had been transported from the mouth of the mine to the mill and subjected to mill treatment and reduced to the form of concentrates. This proceeding adopted by the assessor was not in accord with the rules prescribed by the statute for his guidance in determining the value of a producing mine.
>
> "When the statute required the statement to show the number of tons of ore extracted for the guidance of the assessor, the legislature used the word 'ore' in the usual sense in which that term was employed by those engaged in that industry. Webster says: 'The term ore

has usually been applied, among miners, to the crude material obtained, without other than hand sorting of the lumps.' The statute has reference to the gross tonnage of ore extracted from the mine, before treatment or reduction has taken place. It is uncontroverted that the ore actually extracted amounted to 6,021 tons, and the assessor was in error in refusing to adopt that tonnage, as 'the number of tons of ore extracted during the preceding year.' The plaintiff placed the gross value of the 6,021 tons of ore extracted at $120,000, but the assessor, taking the tonnage of the concentrates as it came from the mill, reached a different and higher gross value. The gross value must be determined from the ore actually extracted from the mine, and not after mill treatment. Gross value includes cost of extraction and excludes cost of treatment, reduction, sale and transportation. *Paxson v. Cresson Co.*, 56 Colo. 206, 139 Pac. 531; *Tallon v. Vindicator Co.*, 59 Colo. 316, 149 Pac. 108.''

In his letter Mr. Whatley gives a number of computations showing what the assessor either did or what he might have done in making the assessment. There is nothing before us to show just what the assessor did. But, unless the assessor started from a correct basis by properly fixing the gross value of the ore, it follows, of necessity, that his figures on gross proceeds and net proceeds could not thereafter be correct.

(2) WAS THE SELLING COST DEDUCTIBLE?

The second question deals with whether an item of $158,774 claimed by the taxpayer to have been expended in selling the company's output is allowable as a deduction under Subdivision ''a'' of Section 7261. You state that the point in issue seems to be whether our Supreme Court has decided that the word ''or'' means ''and'' in item ''Eighth'' under Subdivision ''a'' of said statute.

We have been unable to find that our Courts have ever dealt with the exact question of whether the deduction of one of the expenses mentioned in said item will prevent the deduction of the others. But in at least two cases while not dealing with this precise question, the Supreme Court implied that the word ''or'' was used in a conjunctive rather than an alternative sense. However, this matter was not involved and the rather loose language employed in the decisions hereinafter discussed cannot be considered as controlling.

In enumerating the expenses which are deductible in making a computation of the gross proceeds under this statute, the following are found:

"Seventh—Actual cost of transportation to place of reduction or sale.

Eighth—Actual cost of treatment, reduction or sale."

In the case of *Paxson v. The Cresson Mining Company*, 56 Colo. 206, the court states that the legislature "in directing the assessor to ascertain the gross proceeds of a mine from such statement, meant that he should determine the sum received by the owner for his ores, *by deducting from its gross value all expenses mentioned in the statute* except the cost of extracting it from the mine." And further:

"It is evident then that the legislature had in mind that the gross value of ore extracted from a mine and the gross proceeds of such mine had different meanings. In order for the owner to realize any proceeds from the operation of his mine he must convert the ores extracted into cash. Such ore has a gross value. That, however, is not the amount the owner realizes from its sale. If he transports it to a smelter he must pay the cost of such transportation. This expense he is required to exhibit in his statement to the assessor. If he sold to a smelter a charge for reducing it is made which is deducted from its gross value. This is an expense which he must also show by his statement. Each of these items of expense, when deducted from the gross value of the ore, leaves the owner the difference between such value and those expenses as the proceeds of the transaction."

But it must be remembered that the matter of whether the mining company may deduct only one of the expenses mentioned in item Eight or whether he may claim them all was not in issue in those cases. From the language employed by the court in this case in construing the statute in question it would point rather strongly to the opinion that every expense mentioned in the item would be deductible. Different language might have been used had any narrower construction been demanded under the issues as presented.

The court, in saying that the gross proceeds was the amount realized by the taxpayer after paying all the expenses mentioned in the statute, declared, in effect, that the gross proceeds was the amount of money which came into the company's treasury in any event.

In the case of *Tallon v. The Vindicator Consolidated Gold Mining Company*, 59 Colo. 317, the court affirmed the opinion in the Paxson case in the following language:

"September 6, 1913, we handed down an opinion in what is known as the Cresson case, overruling the lower court, in which we construed 'gross proceeds' to mean the gross value of the ore extracted, without deducting the expenses of the cost of transportation to the place of sale or reduction, and the cost of sale, treatment or reduction. Following this opinion as the correct interpretation of the law, the assessor construed 'gross proceeds' to mean the gross value of the ore extracted from the mine without any deductions. March 2, 1914, this opinion was withdrawn, and a final opinion upon petition for rehearing was announced, affirming the judgment of the lower court, in which we held that the words 'gross proceeds' did not mean the gross assay value of the ore extracted from the mine without deductions, but meant the amount of money actually received by the owner for his ore, after deducting the cost of transportation to the place of sale or reduction, and the cost of sale, treatment, or reduction."

It will be noted that the court retains the word "or" in dealing with the statute in this opinion and the context shows that the court had no such question in mind as the one now raised.

Therefore, since the question of the alternative use of the term was not before the court in those cases, and since the statements are really to be classed as *obiter dicta*, it is the opinion of this office that you would be justified in refusing the application of the taxpayer for a deduction of the selling cost in this case.

As you have suggested, the term is very elastic and might furnish the occasion for abuse. If the taxpayer were to go into court to establish his claim that a different meaning was intended, strict proof of the items claimed as deductible would be required and the danger of abuse would be eliminated.

From an examination of the opinions and the context of the statute, however, it seems probable that the court would be inclined to hold that the conjunctive meaning of the term was intended by the legislature, and that all of the expenses really are properly deductible.

Henrie v. Greenlees, 71 Colo. 528.
Empire Co. v. Stratton, 22 App. 577.

(3) WAS THE TAXPAYER PROPERLY TAXED FOR CONCENTRATES?

The third complaint is that the Board of Equalization erred in assessing the company as a manufacturing concern upon the value of certain concentrates under Sections 7231 and 7232, C. L. 1921, which provide as follows:

"7231—In ascertaining the amount of moneys of any taxpayer, or the moneys by such taxpayer invested in merchandise or in manufactures, the assessor shall ascertain the average amount during the fiscal year for which the tax is to be levied; and the average amount of such moneys and the average value of such merchandise or manufactures during twelve months ending with the thirty-first day of March of such fiscal year shall be taken as a true measure of the average amount of moneys and the value of such moneys invested in merchandise or manufactures for such fiscal year."

"7232—In listing the moneys, credits and moneys invested in merchandise or manufactures, the person making the list shall state the average of such moneys and credits and the average value of money invested in such merchandise or manufactures, during each calendar month of the year ending with the thirty-first day of March of the then current year. If he has not been a resident of the county or has not been engaged in the business of merchandising so long, then he shall take the average during such time as he may have been so resident or engaged; and if he be commencing, he shall take the amount of money or value of the property on hand at the time of listing. Any person who purchases, receives or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, reducing, extracting, refining, purifying, or by the combination of different materials with a view of making gain or profit by so doing and by selling the same, shall be held to be a manufacturer for the purpose of assessment and collection of taxes, and he shall list for taxation the average value of such property in his hands, estimated as merchants are directed by the preceding section to estimate the amount invested in merchandise."

The application sets forth that the company is engaged in the extraction of ores from its properties in Lake County. That the ore is taken from the mine and crushed and then transported to the company's concentrating plant one mile away. Thereafter these concentrates are shipped to the company's own refinery at Langloth, Pennsylvania, for refining. It appears further that the company is engaged in the sale of the finished product, molybdenum.

The board found that a certain quantity of these concentrates was kept on hand during the year and levied an assessment against the company by reason of such concentrates so held, under the sections quoted above.

The first reason assigned by the taxpayer as grounds for the complaint is, "This is clearly a double assessment, because any way it can be figured, the assessor has already assessed us for these same concentrates."

We think it is clear that there is no double assessment here for the reason that the concentrates were not assessed in the first instance. The value of the company's product was used as a factor in determining the value of the mining property as realty, only, and the severed product which has become concentrates is personal property which is utterly apart and distinct from the real property.

The opinion of this office is that these concentrates are subject to tax unless they appear to be exempt under some provision of the Constitution. Article X, Sections 4 and 5 state what property is exempt in the following language:

> Section 4: "The property, real and personal, of this state, counties, cities, towns and other municipal corporations and public libraries, shall be exempt from taxation."
>
> Section 5: "Lots, with the buildings thereon, if said buildings are used solely and exclusively for religious worship, for schools, or for strictly charitable purposes, also cemeteries not used or held for private or corporate profit, shall be exempt from taxation, unless otherwise provided by general law."

Section 6 then says:

> "All laws exempting from taxation, property other than that hereinbefore mentioned shall be void."

Clearly they are not exempt and are subject to taxation. Nevertheless, the assessment under these particular sections would not seem to be justified. The fact that mine concentrates are held for a period by the company which produced them, would not seem to bring the taxpayer within the provisions of a law which in its application has to do with the average value of goods and raw materials held for sale, manufacture, refining or purifying over a period of twelve months. Essentially this is a mining concern and its classification as a manufacturing concern of the character with which this statute deals, cannot be upheld. The concentrates of this and every other mining concern should be assessed by the same law in order to satisfy our requirements as to uniformity.

Leonard v. Reed, 46 Colo. 307.

Carbon County Sheep & Cattle Co. v. Commissioners of Routt County, 60 Colo. 224.

It is the opinion of the office that such concentrates should be subject to tax but that the tax should not be levied under the provisions of the manufacturing statutes.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General,
RALPH L. CARR,
Assistant Attorney General.

104. TAXATION

To Homer Bedford, May 7, 1927.

Produce handled by local dealers or shippers who buy from farmers is not exempt from taxation. The claim that a man who might have it in possession as a dealer at some time in the year later than April 1 pays no tax thereon does not mean that the taxing agency has lost any right of assessment against such produce.

105. POLICE PENSIONS

To J. Arthur Phelps, May 10, 1927.

Sub. (b), Sec. 6, H. B. 465, requiring fees, rewards and emoluments given or paid to the police department, or any member thereof to be turned into the Pension Fund, is mandatory.

106. HIGHWAYS

To D. G. Reynolds, May 10, 1927.

Sec. 1290, C. L. 1921, authorizing county commissioners to declare *any* section or township line on public domain a public highway, does not justify a blanket order declaring *all* section and township lines in the county public highways.

107. SCHOOLS

To Avery T. Searle, May 10, 1927.

Members of a high school committee shall exercise the duties of such office until their successors are duly qualified.

108. SCHOOLS

To Miss Bertha S. Major, May 10, 1927.

Teachers' first grade certificates may be renewed by the county superintendent or the board of education.

109. BLIND BENEFITS

To Commission for Blind, May 10, 1927.

If the funds appropriated to carry out the purposes of the act for the relief of the blind (Ch. 60, S. L. 1925 and amendments

thereto) shall be insufficient to pay in full all awards made by the Commission, then such awards should be revised so that all applicants may receive equal consideration.

110. VOCATIONAL TRAINING

To Colorado State Federation of Labor, May 10, 1927.

Under Sec. 5, Chap. 156, S. L. 1925 concerning the rehabilitation of the physically disabled, the State Board for Vocational Education may carry on its work with money donated when the legislature has failed to make an appropriation for it.

111. CITIES AND TOWNS

To Bent County Democrat, May 16, 1927.

C. L. Sec. 9170 requires that an ordinance must be published once after it is introduced and before it is finally adopted. In addition an ordinance must be published after its final adoption. A publisher is entitled to charge for each publication as a first insertion.

112. COUNTY CORONER

To Chas. Scheer, May 16, 1927.

C. L. Sec. 8696 defines the form to be used by a county coroner in submitting accounts to the county commissioners for payment.

113. COURTS

To Charles Pike, May 17, 1927.

Accrued interest on funds held under order of court should go to the person for whom such funds are held.

The county has no claim upon interest earned on registry funds.

114. STATE ENGINEER

To M. C. Hinderlider, May 17, 1927.

Ditch owners are required to erect and maintain in good repair head gates in connection with their ditches and if they fail to do so, the state engineer, upon ten days' written notice, shall refuse to deliver them water until the necessary headgates are erected.

115. INDUSTRIAL SCHOOL

To Claude D. Jones, May 18, 1927.

The State Industrial Schools are not penal institutions and therefore are not subject to the provisions of Sec. 4180, C. L. 1921, which requires that eight hours shall constitute a day of work for employes in penal institutions.

116. MOTOR VEHICLES

To Boggs Realty Co., May 18, 1927.

Sec. 17 of House Bill 430, which goes into effect ninety days after April 30, 1927 requires that every motor vehicle carrier, as defined in the Act, shall file with the Public Utilities Commission a liability insurance policy or a surety bond, issued in conformity with the laws of the state.

117. CIVIL SERVICE

To Civil Service Commission, May 18, 1927.

A person placed upon the eligible list for a civil service position cannot be deprived of his rights under the constitution by any mistake, oversight, or inadvertence on the part of the commission but his own conduct may amount to a waiver, forfeiture or abandonment of his rights. A court decision is necessary to determine who is entitled to the position of company commander at the Industrial School for Boys.

118. STATE BOARD OF ACCOUNTANCY

To State Board of Accountancy, May 19, 1927.

The examination fee paid by applicants for a license should not be returned in the event that the applicant fails to pass the examination, but the applicant is entitled to be re-examined within eighteen months without the payment of any additional fee.

119. MILITARY DEPARTMENT

To Paul P. Newlon, May 20, 1927.

A county sheriff may not refuse to serve a warrant issued by a court officer of the national guard nor refuse to receive prisoners sent him by the national guard.

120. SCHOOLS

To John C. Vivian, May 20, 1927.

Warrants registered in excess of the amount provided by law may be retired by the issuance of bonds under C. L. Sec. 8356.

The county treasurer may register warrants provided the aggregate does not exceed the current year's tax levy.

When a teacher's salary exceeds $75.00 the excess must be paid from the special fund levied under the authority given by Sec. 8286 and warrants against this fund may not be registered in excess of the current levy.

A school district may not legally expend funds to construct or maintain a public highway to or through the district.

There is only one way to retire excess school warrants gradually and that is by levying a tax each year for that purpose.

121. COAL MINE INSPECTION

To James Dalrymple, May 25, 1927.

H. B. No. 100 does not exempt mines employing five men or less from having a certified fire boss.

122. COUNTY CLERK AND RECORDER

To Mr. C. R. Furrow, May 25, 1927.

Sec. 7 of the Act of 1927 (S. B. 274) does not make it necessary to record a promissory note secured by mortgage or trust deed, as the note does not purport to affect the title to real estate.

123. ANATOMICAL LAW

To construe this law so as to eliminate pauper burials and require unclaimed human bodies to be turned over for dissection where burial would otherwise be required to be made at public expense, would be so utterly at variance with concepts of Christian civilization, that such construction should be avoided until the highest court shall have declared that no other construction is possible.

To J. A. Carruthers, May 26, 1927.

Dear Sir:

In your letter of the 9th inst. you ask my opinion as to the meaning and effect of Senate Bill No. 208 approved and in effect March 28, 1927, entitled "An Act for the promotion of medical science by the distribution and use of unclaimed human bodies for scientific purposes, and to create a self-supporting board for that purpose, and to prevent unauthorized uses and traffic in human bodies."

The particular point to which you direct attention concerns the meaning of the word "unclaimed" as used in this statute. You suggest that the word unclaimed may mean the same as "unidentified" or, on the contrary, the word unclaimed may mean unclaimed by a person willing and able to bury the body at his own expense. If the latter meaning is correct, then, as you suggest, pauper burials are practically eliminated and such is the construction you have already placed upon this Act as stated in your letter.

I think your construction of this statute is in conformity with the terms of the Act and it is very difficult, if not impossible, to construe it in any other way and still keep within recognized rules of statutory construction. However, to so construe this Act as to eliminate pauper burials and to require human bodies to be turned over for dissection in all or practically all cases where burial would otherwise be required to be made at public expense, would, in many cases, result in consequences so utterly at variance with every decent concept of a Christian civilization that I think that no such construction should be attributed to this Act if it can be avoided and I would never go on record as so con-

struing it until the highest court available had declared that no other construction was possible. The instance you point out in your letter is typical of what might happen under this law. An aged husband and wife might become, through no fault of their own, public charges and in the event of the death of one of them the survivor would be required to stand by and see the corpse of the deceased spouse carted away to be cut to pieces for the promotion of medical science and the remains thereof afterwards "disposed of by burial or cremation" which means that the burial might be in a hog pasture or the cremation in a garbage heap. The dissection Act adopted by our General Assembly nearly half a century ago was far more humane than the present statute, for that statute did not allow dissection in cases where any person, whether kindred or friend to the deceased, "shall request the body for burial" and this old Act did not require by express language at least that the person requesting the burial must bear the expense thereof. This old statute also required that after the work of dissection was completed the remains "shall be decently buried." I doubt very much if this recent Act would have passed the General Assembly or received the approval of the Governor had the inhuman consequences which might arise out of it been fully realized.

There is a rule of statutory construction to the effect that legislative Acts should be so construed as to avoid absurd or unreasonable consequences. I think there is or ought to be a rule of construction also to the effect that statutes will be so interpreted or construed as to keep them in harmony, if at all possible, with the enlightened sentiments of civilized society.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
CHARLES ROACH,
Deputy.

124. MOTOR VEHICLES

To Frank H. Wolcott, May 26, 1927.

The State University is subject to the Gasoline Tax Act of 1927 and to the Motor Vehicle License Act of 1919 as amended in 1923.

125. OLD AGE PENSION LAW

To Board of County Commissioners, June 1, 1927.

It is not the province of the Attorney General's office to pass upon the constitutionality of Senate Bill No. 46, since such an opinion would be entirely unofficial and in the event of suit being brought, might not be in accord with the opinion of the Supreme Court, which would be controlling and final.

126. OFFICERS

To Civil Service Commission, June 2, 1927.

The position of assistant superintendent of maintenance in the Highway Department and of field organizer in the office of the Director of Markets are not civil offices but rather partake of the nature of employments. Consequently either could be held by a member of the General Assembly.

127. COLLECTION AGENCIES

To Chas. M. Armstrong, June 3, 1927.

County credit associations conducting a collection department must give the bond required by H. B. 88 of the 26th General Assembly.

128. POLICE OFFICERS

To H. D. Harper, June 8, 1927.

Under H. B. No. 147 there could be no valid objection after the issuance of free transportation by one public utility to two detectives selected as prescribed by law to the issuance of similar privileges by any other railroad or public utility to the same detectives or to others who might be selected by the chief of police.

129. COUNTIES

To A. E. Creighton, June 10, 1927.

Registered school warrants may be used as security for the deposit of county funds.

130. COUNTY OFFICERS

To Mr. M. C. Hinderlider, June 11, 1927.

A county sheriff is eligible to appointment as Deputy Water Commissioner, since the two offices are not incompatible.

131. SCHOOLS

To R. C. Egnew, June 13, 1927.

Sec. 8456, C. L. 1921, provides that in every first-class school district there may be created a school teachers retirement fund. This, in our opinion, makes it optional with the board of education whether said fund be established.

132. INDUSTRIAL COMMISSION

To Industrial Commission, June 14, 1927.

House Bill No. 456, effective May 1, 1927, by implication repeals Ch. 251, S. L. 1921, so far as there is any conflict, and under the 1927 law it is unnecessary to submit items of salary and operating expenses of the State Compensation Insurance Fund to the Auditing Board for its approval.

133. LUNATICS

To Clayton C. Rickel, June 14, 1927.

U. S. Pension drawn by mental incompetent may be used by conservator to pay allowance to minor child and for maintenance of incompetent in Colorado State Hospital, in the order named.

134. MOTOR VEHICLES

To Finlason Realty Co., June 15, 1927.

One engaged in taxi service who makes occasional trips outside of the limits of his town must file a liability insurance policy or give a surety bond to the Public Utilities Commission.

135. ALCOHOL

To The Early Coffee Co., June 17, 1927.

Manufacturers and others licensed by the Secretary of State of Colorado to use alcohol, may purchase alcohol from wholesalers holding Colorado license, and may not purchase outside of state and import.

136. TAXATION

To Alex. S. Simpson, June 17, 1927.

Furniture and fixtures of national bank may not be separately assessed as such, even where bank is in hands of receiver.

137. LUNATICS

To George C. Twombly, June 17, 1927.

The expense of inquests to inquire into the sanity of an individual is provided for by the Laws of 1915, and therefore Section 565 as amended does not apply to the expense of committing an insane person to the State Hospital.

138. SCHOOLS

To S. Earl Forbes, June 18, 1927.

There is no statutory method for dissolving a high school district.

139. SCHOOLS

To S. Earl Forbes, June 18, 1927.

Sec. 8392, C. L. 1921, provides that upon the organization of Union H. S. District, Class B, the district in the incorporated town shall in the first instance provide the school building. Thereafter any and all repairs, additions, or new building should be provided by the Union H. S. District as a whole.

140. TAXATION

To Robt. H. Swinney, June 18, 1927.

Buildings used as hospitals are not exempt from taxation if rent is charged for same by taxpayer.

141. SCHOOLS

To Alice Burnett, June 20, 1927.

When transportation has been authorized by the electors in accordance with the provisions of Sec. 8338, C. L. 1921, the authority of the Board of Directors is a continuing one and remains in effect until an adverse vote is had.

142. ITINERANT VENDOR'S ACT

To Carl A. Kaiser, June 21, 1927.

The Transient Dealer's Act, Ch. 100, C. L. 1921, did not repeal the Itinerant Vendor's Act, found at Ch. 73, R. S. 1908.

143. SCHOOLS

To S. E. Chubb, June 24, 1927.

A tax levy voted at meeting of electors in third class districts cannot be changed or reconsidered by board of directors.

144. CO-OPERATIVE MARKETING

To Chas. M. Armstrong, June 24, 1927.

The annual fee required by Sec. 32, Ch. 142, S. L. 1923, becomes delinquent, by virtue of the provisions of Sec. 31 of same Act, if not paid before May 1st, and subject to the same penalties prescribed by Sec. 7280, C. L. 1921, for non-payment of corporation license tax.

145. APPROPRIATIONS

Appropriations must be classified by the State Auditor in accordance with the provisions of C. L. Sec. 288.

Excess appropriations of the second class can probably be paid out of continuing mill levies for institutions or departments in lower classes.

To Hon. W. D. McGinnis, June 28, 1927.

Dear Sir:

In your letter of the 9th inst., you state "that at a recent meeting of the State Auditing Board at which meeting classification was made of the appropriations made by the last legislature" certain items enumerated by you and hereinafter specifically mentioned "were included in the first class," and that certain other items so enumerated and hereinafter specifically mentioned were "included in the second class." You state further that "inasmuch as Chapter 13 on page 37 of the Session Laws of

1913 seems to particularly designate such appropriations as shall be placed in the first and second classes, etc., and inasmuch as the items'' so listed in your letter ''and possibly others seemingly are not such as are designated by said Chapter 13 as first and second class appropriations'' you ask my written opinion ''as to just which of such items named by the State Auditing Board as first and second class appropriations'' shall be paid by you as such.

You also point out that the last General Assembly made appropriations in excess of the estimated revenues of the present biennial fiscal period and that such excessive appropriations amount to the approximate aggregate sum of $1,300,000. You further state that ''the items included in the first and second classes by the State Auditing Board exceed the estimated revenues by some $1,150,000.'' You conclude your letter with the observation that ''It therefore seems apparent that the first and second class appropriations as classified by the State Auditing Board cannot be paid in full.''

The statute you mention in your letter is Section 288 C. L. 1921 which reads as follows:

> ''In case the available revenues of the state for any fiscal year are insufficient to meet all the appropriations made by the general assembly for such year, such appropriations shall be paid in the following order:
>
> FIRST. The ordinary expenses of the legislative, executive and judicial departments of the state government, and interest on any public debt, shall first be paid in full.
>
> SECOND. Appropriations for all institutions, such as the penitentiary, insane asylum, industrial school and the like, wherein the inmates are confined involuntarily, and appropriations for charitable institutions, shall be next paid.
>
> THIRD. Appropriations for educational institutions; *Provided*, That in case there are not sufficient revenues for any fiscal term to meet in full the appropriations for educational institutions, after providing for the necessary amounts appropriated according to paragraphs first and second of this Act, then in that event whatever there may be to apply on account of said appropriations for said educational institutions, shall be distributed among all of said institutions appropriated for pro rata according as the amount appropriated for each of said institutions shall bear to the total amount available for all of said educational institutions for said fiscal term.
>
> FOURTH. Appropriations for any other officer or

officers, bureaus or boards, to be paid pro rata, if there be not sufficient funds to pay in full.

FIFTH. All other appropriations made pro rata out of the general fund shall next be paid from all revenues available to meet such appropriations."

You are correct in the implication contained in your letter that as a responsible, accounting officer of the State you are bound by the statute classifying appropriations, regardless of any action the State Auditing Board may have taken relative to such classification. The fact is that the statute itself above quoted classifies the appropriations made by the General Assembly and nothing remains to be done in that behalf by any administrative board or officer, except to construe and apply that statute as it reads. The State Auditing Board was created by an Act of the General Assembly passed in 1911, and neither that statute nor any other devolves upon that Board the power or duty of classifying appropriations. (See Sections 274-287, C. L. 1921.) This, as you will recall, was explained by me to the Board on one, if not several occasions during the deliberations of the Board.

Upon this matter of the classification of appropriations, the primary duty of determining the classification of appropriations pursuant to said Section 288 rests, as I shall hereafter show, upon yourself as Auditor of State, and upon the State Treasurer acting upon the advice, if deemed necessary, of the Attorney General upon doubtful questions of the construction of said statute.

I am advised that it has long been the custom of the State Auditing Board to participate, as a Board, in the classification of appropriations; but its action in that behalf is necessarily merely advisory and voluntary in character and has no legal sanction or effect whatsoever. This matter of classification is quite unimportant when the revenues of the fiscal period are adequate to discharge appropriations payable therefrom. But when a serious deficit impends, it is needless to say that the classification statute should be carefully adhered to.

Section 102, C. L. 1921, provides, *inter alia*, that the Auditor of State shall "prepare and report to the governor at least twenty days preceding each regular session of the general assembly: * * * Estimates of the revenue and expenditures for the two succeeding fiscal years, and the probable amount of revenue derivable from the various sources of revenue."

The duty of the Auditor of State and of the State Treasurer in the face of a probable deficit has been clearly stated by the Supreme Court in a series of decisions. Thus in *In re Appropriations*, 13 Colo. 325, the Court says:

"What we have said of the legislative department in respect to making appropriations or authorizing expendi-

tures in excess of constitutional authority applies with equal force to the executive department in recognizing or dealing with legislation affecting the public revenue. If legislative acts making appropriations in excess of constitutional limits have unfortunately received the governor's signature instead of his veto, he should nevertheless withhold his approval from any and all vouchers relating to such unconstitutional appropriations. So, also, the auditor should refuse to draw any warrant therefor, and the treasurer should decline to make payment thereon. In reference to matters arising under enactments clearly unconstitutional, the unauthorized act of one government official is no justification or excuse for a similar act by another. The character and scope of the interrogatories submitted compel us to speak thus plainly upon these points."

In *Henderson v. People, etc.*, 17 Colo. 591, the Court speaks as follows:

"* * * it is the duty of every public officer connected with the administration of the state finances to treat as void each and every appropriation in excess of constitutional limits. It is only by a strict observance of this rule by all departments of the government that the financial credit of the state can be upheld, and troublesome litigation and ultimate loss, either public or private, avoided."

In *Goodykoontz v. The People, ex rel.*, 20 Colo. 376, the court in speaking of the duty of the Auditor of State in the event of a shortage of revenue, says:

"His duty is to marshal the treasury assets and appropriations, and act in reference thereto by an impartial rule. Taking into account the funds on hand, and the revenues to be anticipated, based upon actual levies, the auditor is bound, after reserving sufficient funds for the payment of preferred appropriations and expenses, to issue warrants for other appropriations in the order of the taking effect of the legislative acts making such other appropriations, taking care never to issue warrants in excess of the funds or revenues provided for their payment."

From *Stuart v. Nance*, 28 Colo. 206, we quote the following:

"In case of a shortage of the public revenues a warrant drawn in payment of a preferred claim though presented for payment and registered subsequent to the

> presentation and registration of a warrant, for a non-preferred, or deferred, claim, must, notwithstanding its later registry, be paid before payment of the earlier registered deferred claim. The auditor must take such steps and prescribe such regulations and safeguards in the issuing of a warrant, and the treasurer must do likewise as to the payment, as will, in case of such deficiency, secure this result."

The classification act above quoted which must guide you in determining the priority of the various appropriations is not, in the main, difficult of application, though it is obscure in at least one important respect and silent in another. For instance, you will note that appropriations for "the ordinary expenses of the legislative, executive and judicial departments of the state government" are placed in the first class, while appropriations "for any other officer or officers, bureaus or boards" are declared to be of the fourth class. Yet by the express terms of the state constitution *all* the powers of the state government are divided into but three departments; viz: "the legislative, executive and judicial" (see Article III), and all appropriations for any of these three departments are, as above stated, by this statute declared to be of the *first* class. Now since all the powers of government are comprehended within the terms "legislative, executive and judicial," the question necessarily arises—How can there be a legally created state office, board or bureau that is neither legislative, executive or judicial in its character, and, therefore, to be provided for by a first class appropriation under the terms of the "first" paragraph of said Section 288. In a word, if the functions of such office, board or bureau are either legislative, executive or judicial in character, an appropriation for its maintenance necessarily falls in the *first* class, because that class is declared to include all appropriations for the expenses of any of the three departments mentioned, and since, strictly speaking, there can be no office, board or bureau that is neither legislative, executive or judicial in character, it follows that the "fourth" paragraph of the classification act is ambiguous, to say the least. Nor could the dilemma be solved by saying that the phrase "legislative, executive or judicial" departments as used in the constitution, or in this statute, means only the departments as created and constituted by the constitution itself, for the Supreme Court in *Parks v. Soldiers' and Sailors' Home,* 22 Colo. 94, says:

> "In declaring what officers should constitute the executive department of the state, it was not intended that the legislature should not create new executive officers. Such a presumption would do violence to the intelligence of the framers of that instrument, and of the people who adopted it. It is, we think, the purpose of this section

to provide for such officers of the executive department as the members of the constitutional convention deemed absolutely indispensable; leaving it to the legislature to create new offices as the growth of the state and experience might suggest, and to abolish the same, but without authority to abolish any of those enumerated."

And further:

"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.

"Our conclusions upon this branch of the argument may be summarized as follows: That as to those offices not expressly enumerated in the constitution, the legislature has plenary power to create or abolish the same, subject to well known constitutional restrictions. It may, subject to such restrictions, increase or diminish the salaries of the incumbents, but while the offices are in existence, and the officers are discharging their duties, appropriations made for their salaries or necessary expenses are entitled to take rank with the ordinary expenses of the state government."

In speaking of this ambiguity in the statute, Attorney General Farrar said:

"Difficulty arises in making the classification of certain departments, particularly as between the first and fourth classes. The fact that the appropriation is made for a board or a bureau does not, of necessity, place the appro-

priation in the fourth class. I would say that the test is rather the duties which devolve upon the board or the bureau, and if these duties pertain to the execution of law or the administration of the affairs of state, in the absence of some other controlling provision, they naturally fall into the first class rather than into the fourth class."

—Biennial Report, Attorney General, 1913-1914, page 37.

The meaning and effect of other parts of this act are, however, so obvious that their mandate is imperative and unmistakable; for example, all appropriations, for institutions such as the penitentiary, insane asylum, state industrial school and the like, wherein the inmates are confined involuntarily, and appropriations for charitable institutions, are placed in the second class, and appropriations for educational institutions are as definitely placed in the third class.

Approaching now the particular appropriations mentioned in your letter, you will recall that I declined to participate, even in an advisory capacity, in the classification, or purported classification by the State Auditing Board of several of them, because I entertained serious doubts as to their constitutionality, and this opinion, therefore, upon the question of classification is not to be taken by you as an affirmation of the validity of any such appropriations.

Answering now, as best as I can in view of the ambiguous character of the statute in the respect above mentioned, your request for an opinion upon the specific items set forth in your letter, you are advised as follows:

"Child Welfare Bureau—$8,000:" This bureau was created by Section 8490 C. L. 1921, which places it "under the control of the department of public instruction," meaning apparently the office of the State Superintendent of Public Instruction which is declared by Article IV of the Constitution to be a branch of the executive department. That is to say, this bureau is an adjunct, as it were, of a branch of the executive department of the state government as defined by the constitution. I am, therefore, of the opinion that this item belongs to the first class.

"Sheppard-Towner Act—$10,000:" The "Sheppard-Towner Act for the promotion of the welfare and hygiene of maternity and infancy and for other purposes" was "accepted" by Colorado by Chapter 79, S. L. 1923, and the Child Welfare Bureau was by that statute designated as the state agency to participate in its administration. I, therefore, believe that this item belongs to the first class.

"Child and Animal Protection—$23,950:" By an act of the 13th General Assembly the Colorado Humane Society was consti-

tuted a state bureau of child and animal protection and it was thereby made the duty of said bureau "to secure the enforcement of the laws for the prevention of wrongs to children and dumb animals." (Sec. 68, C. L. 1921.) This bureau is therefor one of the law-enforcing agencies of the state, and I am in accord with the opinion of Attorney General Farrar, above quoted, that an appropriation for its maintenance belongs in the first class.

"Director of Markets—$21,000:" Chapter 141, S. L. 1923, creates "the office of Colorado Director of Markets" and defines his powers and duties. Those duties are, briefly, to foster the agricultural and allied industries of the state. Those industries are vital to the prosperity and general welfare of the state and its people. While there may be some doubt as to whether the appropriation for the maintenance of this office falls in the first, rather than in the fourth class, my best judgment is that it is properly assigned to the first class.

"Immigration Board—$34,660:" The Colorado State Board of Immigration was established in 1909. Its function is to enhance the development, wealth and prosperity of the state by collecting and disseminating information relative to its resources, industries, climate, etc. (Sec. 431, C. L. 1921.) Here, also, there may be a question as to whether the appropriation for this Board belongs to the first, rather than the fourth class, but you are in my opinion justified in allowing it to stand as an item of the first class.

At this point it will be noted that all of the above items are contained in the general appropriation bill, and Section 32, Article V of the Constitution provides that "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." So if these items *are not* expenses of an executive, legislative or judicial department they are void altogether, and *per contra*, if they *are* ordinary expenses of such departments, or any thereof, they are properly assignable to the first class for said Sec. 288 declares that the first class shall include "ordinary expenses of the legislative, executive and judicial departments of the state government."

I shall next consider the specific items which you set forth as having been "included in the second class."

"Adams Normal—$81,750:" This appropriation was made by House Bill No. 129, approved April 1, 1927, "for the improvement, equipment, and general support and maintenance of the Adams State Normal School" during the now current biennial fiscal period. This school was established by Section 8187, C. L. 1921, which provides that its purpose "shall be instruction in the science and art of teaching and in such branches of knowledge as shall qualify teachers for their profession," while Chapter 13, S. L. 1923 declares that "said school * * * shall form a part of the normal school system of the state." There can be no doubt, therefore, that

this school is an educational institution. Said Section 288 places "appropriations for educational institutions" in the third class. As already stated, the statute itself classifies appropriations and nothing remains for administrative officers to do but to ascertain the meaning and intent of the statute and to so apply it. Here there is, in my opinion, no doubt whatever as to the meaning and effect of the statute, and I must advise you that you cannot properly do otherwise than treat this item as one of the third class.

"Adams Normal Deficiency—$27,856.39:" This appropriation was made by Senate Bill No. 240, approved March 4, 1927, "for the reimbursement of the Citizens Finance Committee of Alamosa, Colorado, for the principal sum of moneys advanced by them for the payment of vouchers regularly issued on account of the operation and maintenance of the Adams State Normal School at Alamosa, Colorado, during the biennial fiscal period ending November 30, 1926." Said Senate Bill expressly declares that "this appropriation shall be of the third class." Had this act been silent as to the matter of classification this item could not possibly, for reasons already noted, have been rated any higher than the third class under the general classification act above quoted. But in any event, you would have no right, in my judgment, to put aside the express legislative declaration in the bill itself that the item is of the third class, and assign it to a higher class.

"Jennie C. Jackson Deficiency—$312.50:" This item was appropriated by House Bill No. 99, approved May 2, 1927, "for the salary of Jennie C. Jackson as teacher for the adult blind from April 24, 1925, to July 11, 1925." The facts with reference to this item are, as I am advised, substantially as follows: Mrs. Jackson was on and prior to April 24, 1925, holding the office of "state teacher of the adult blind," which office was created by Section 737, C. L. 1921. That section was expressly repealed by Section 13 of Chapter 60, S. L. 1925, approved and in effect April 25, 1925, which established a state commission for the blind and expressly empowered it, among other things, to employ a state teacher for the adult blind. In view of that provision in the new act, Mrs. Jackson assumed that the newly created commission would continue her in the service as state teacher regardless of the repeal of the old act which had created her office. She accordingly continued to perform her duties as though her tenure of office had not been terminated by the repeal until July 11, when the new commission met and resolved not to engage her services. This claim is at most but a moral, rather than a legal, obligation against the state, and could not, in my opinion, be rated higher than the fifth class.

"Joe Bruno—$2,500:" This item was appropriated by Senate Bill No. 146, approved May 5, 1927, for the purpose, as recited in the bill, of paying "Joe Bruno for his damages sustained by reason of the unprovoked criminal assault made upon him by a member of Troop C, First Squadron of Cavalry, National Guard of Colo-

rado, while that organization was engaged in strike duty at Aguilar, Colorado, on or about April 22, 1914, when said member of Troop C shot said Joe Bruno through his left arm, and through his shoulder, resulting in his permanent disability,'' etc. This claim, likewise, is not a legal obligation against the state, though it may be a moral obligation of such a character as to justify the General Assembly to provide for its payment. It, also, in my opinion, could not, in any event, be rated higher than the fifth class.

''State V. D. Control—$40,000:'' Section 1076, C. L. 1921, established in the State Board of Health a division or department relating to venereal diseases.'' Section 1083, C. L. 1921, makes an annual appropriation of $20,000 for the maintenance of said ''division or department.'' This item, though listed in your letter as having been ''included in the second class'' appears in fact to have been assigned to the first class. I am clearly of the opinion that it belongs to the first class.

''Nicholson Window—$6,000:'' This item was appropriated by Senate Bill No. 103, approved May 5, 1927, ''for the purpose of paying the McMurtry Manufacturing Company 'for having furnished and installed' in the Capitol Building a stained glass window as a memorial of the late United States Senator Samuel D. Nicholson.'' This item is expressly declared by the bill to be ''an appropriation of the second class.'' I think this item may lawfully be regarded as an appropriation of that class.

Later on in this opinion the views of this office relative to the payment of second class appropriations will be set forth at length.

''State Fair Deficiency—$26,560.34:'' This item was appropriated by House Bill No. 20, approved April 4, 1927, ''to pay outstanding bills and obligations of said State Fair for the years 1923, 1924 and 1925.'' It is apparent even from the most casual reading of paragraph ''Second'' of the classification act that this item is not of the second class. It could not, in my opinion, be rated higher than the third class.

It may here be said that the matter of the validity and effect of so-called ''relief'' bills to cover indebtedness incurred by state agencies or institutions during former fiscal periods, or to pay moral, as distinguished from legal, obligations of the state, is a subject that merits special consideration, and will not be dealt with in this opinion, the main object of which is to set forth the condition of the state finances in general.

''Eradication of Predatory Animals—$5,500:'' House Bill No. 179, approved May 7, 1927, appropriates the sum of $15,000 for each of the fiscal years 1927 and 1928, to enable the state board of live stock inspection commissioners to carry on co-operative work with the Bureau of Biological Survey, U. S. Department of Agriculture ''in the eradication and control'' of certain species of predatory animals. The bill expressly declares that ''such appropriation shall be of the third class.'' While this classification is

purely arbitrary, you should not, in my opinion, disregard it by treating this appropriation, or any part thereof, as available for expenditure before the revenues of the state are in such condition as to permit the payment of third class appropriations in whole or in part.

Having thus answered your specific inquiries, and noted your comment upon the existing deficit, I regard it as my duty, as legal adviser of the officers and institutions of the state, to set forth at length and in considerable detail my views as to the legal consequences that arise as the result of such deficit. The fact of the deficit and the approximate extent thereof are well known to all. The legal difficulties that necessarily arise as the result of a known deficit are, perhaps, not so well understood.

The state government has been confronted with large deficits of revenues on several occasions in former years but it can hardly be said that it was ever called upon to meet a more serious financial stringency than the one that now impends. In the language of our Supreme Court, used upon a similar occasion (25 Colo. 301), "These are not idle words of an alarmist. They are measured and deliberate expressions, warranted by the facts."

The revenues from all sources of the present fiscal period, according to your recent revised estimate thereof, aggregate the sum of $4,633,500.

The appropriations, of all classes, payable therefrom, aggregate the sum of $5,953,491.14, leaving a total apparent deficit of $1,319,-991.14.

The first class appropriations, as tabulated by the secretary of the State Auditing Board, aggregate the sum of $2,991,896.21. This total, however, includes the following items which, as above shown, are not entitled to be included in the first class, viz:

Adams Normal	$ 81,750.00
Adams Normal Deficiency	27,856.39
Jennie C. Jackson	312.50
Joe Bruno	2,500.00
	$112,418.89

Eliminating these four items from said total of $2,991,896.21, we find that the actual aggregate of the first class appropriations is $2,879,477.32.

The second class appropriations, as so tabulated, aggregate the total of $2,740,322.46. Eliminating therefrom the item for "State Fair Deficiency—$26,560.34," which I believe is not of the second class, the revised total is $2,713,762.12.

The first and second class appropriations alone thus amount to the total sum of $5,593,239.46, or $959,739.46 more than the available revenues, according to your latest estimate.

The 22nd, 23rd, 24th and 25th General Assemblies largely

over-appropriated the estimated revenues of the respective biennial fiscal periods of 1919-1920, 1921-1922, 1923-1924, 1925-1926.

The total appropriations, as compared with the estimated revenues, of those periods, were as follows:

	Estimated Revenues	Appropriations
1919-1920	$3,646,293.34	$ 4,698,799.01
1921-1922	4,152,180.87	4,749,930.67
1923-1924	4,448,443.51	4,988,209.44
1925-1926	4,362,000.00	5,297,575.01

During each of those bienniums the situation was fortunately very greatly alleviated by the fact that the revenues derived from the taxation of inheritances were uniformly much larger than the successive estimates thereof as made at or prior to the commencement of the respective periods; thus the estimates as compared with the actual receipts from that source were as follows:

	Estimates	Actual Receipts
1919-1920	$350,000.00	$1,294,199.81
1921-1922	600,000.00	1,013,164.15
1923-1924	800,000.00	1,567,891.86
1925-1926	1,200,000.00	1,787,219.84

Reviewing the above figures, it may be noted that the largest apparent deficit was that of 1919-1920 when the appropriations exceeded the estimated revenues to the extent of $1,052,505.67, while the present apparent deficit, as shown above, is $1,319,991.14. During the 1919-1920 fiscal period the revenues from inheritance taxation exceeded the estimate by the sum of $944,199.81, and this item alone of excess revenue thus practically wiped out the apparent deficit of that period. But there is little prospect of relief from such a source during this period, for the estimate of receipts from inheritance taxes during the current period was placed at $1,200,000.00, while the actual receipts therefrom for the first quarter of the period, ending June 1, 1927, were $303,360.05, or only $3,360.05 above the estimate. At that rate of increase, the excess revenues from that source for the whole period would be only $13,340.20. The new inheritance tax statute goes into effect on or about July 4, 1927. The rates established by this new act were so adjusted as to produce substantially the same revenues as were derivable under the present law. No substantial relief can, in my judgment, be reasonably expected from any excess of revenues from inheritance taxation during this period. And there is, of course, some prospect that the income from that source may fall below the estimate. The fluctuating character of the receipts from that source may be illustrated by the fact that in 1915-1916 receipts were $1,069,597.21; in 1917-1918, $661,274.29; in 1919-1920, $1,294,199.81, and in

1921-1922, $1,013,164.15. Nor is there any reason to believe that there will be any substantial increase in the revenue, above the present estimates, from other sources. The present apparent deficit, therefore, promises to continue and it may be aggravated through failure of revenues to meet the estimates.

What then, is the legal status of these excessive appropriations, and how must the revenues of the state be handled in the face of this vast shortage. The constitution and a line of decisions of our Supreme Court afford a plain answer to many of the questions that will arise.

Sec. 3, Art. X reads: "The General Assembly shall provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year."

Sec. 16 of the same article provides that:

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

Sec. 3, Art. XI reads in part as follows:

> "The state shall not contract any debt by loan in any form, except to provide for casual deficiencies of revenue * * * such debt shall not exceed one hundred thousand dollars."

In speaking generally of over-appropriations by the General Assembly, the Supreme Court said, in the Parks case, *supra*, at page 90:

> "These cases, having been consolidated for the purpose of the argument, will be considered together. They are a part of the crop of litigation which springs from the custom of the legislature, at each biennial session, to appropriate money in excess of the revenues of the state, in violation of express constitutional mandates, leaving the various claimants to contest in the courts their rights to the actual revenue.
>
> "This practice on the part of the lawmaking power has led to expensive and vexatious litigation, to the impairment of the credit of the state, resulting not infrequently in the deprivation of some of our most deserving institu-

tions of funds absolutely necessary for their successful operation. To the credit of the legislature, be it said, however, that such unconstitutional appropriations have gradually decreased in amount during the six years that have elapsed since the first opinion of this court was rendered upon the subject, which is entitled *In re Appropriations,* 13 Colo. 316."

The leading decision of the Supreme Court upon the subject of excessive appropriations is that *In re Appropriations*, 13 Colo. 316. We quote at length therefrom:

"By said Section 16 (of Art. X), each and every general assembly is inhibited, in absolute and unqualified terms, from making appropriations or authorizing expenditures of the former class in excess of the total tax then provided by law, and applicable for such appropriation or expenditure, unless such general assembly shall provide for levying a sufficient tax, within constitutional limits, to pay the same within such fiscal year. This language needs no construction. It is plain, simple and unambiguous. It need not be misunderstood. It cannot be evaded. It means that the state cannot be plunged into debt by unauthorized legislation. If the general assembly pass acts making such appropriations or authorizing expenditures in excess of constitutional limits, such acts are void. They create no indebtedness against the state, and entail no obligation, legal or moral, upon the people or upon any future general assembly."

* * *

"We are asked what legal criterion is fixed by which it can be known, at the date of an act appropriating or authorizing the expenditure of money, whether such appropriation or expenditure will be in excess of the prescribed constitutional limits. We answer that there is no absolute criterion which can be relied upon in every instance and under all circumstances. The general assembly must, of necessity, exercise their own judgment in the first instance. But it must not be inferred from this, as some have supposed, that appropriations and expenditures which have been approved by the judgment of the general assembly as being within constitutional limits are therefore valid; for that would be to subordinate the positive requirements of the constitution to mere legislative control. It is absurd to say that a provision of the constitution, expressly designed to restrain and confine legislation within certain definite limits, is nevertheless subject to the unrestrained legislative will. Hence, while the general

assembly must exercise their own judgment in the first instance, yet if, by reason of error of judgment, or for any other cause, they exceed the constitutional limit in making appropriations or in authorizing expenditures, such excessive acts are mere nullities. * * * .''

''Though the general assembly must rely largely upon estimates in making appropriations, yet they are not without suitable guides for all practical purposes. They are clothed with ample powers for securing the most accurate and reliable information concerning the public revenue; and the sources of such information are numerous and easy of access. The auditor's estimates, contained in his biennial report to the governor, as required by Section 1373, General Statutes, should be of great assistance; but they are not conclusive, and, if erroneous, afford no support to illegal appropriations. * * *.''

''The general assembly, composed of representatives from all parts of the state, aided by the records and reports of state and county officers for preceding fiscal years, with power to take testimony and send for persons and papers, should be able to make such estimates that, with reasonable economy, all necessary expenditure may be provided for without transcending the constitutional limit. Illegal appropriations should be carefully avoided, inasmuch as they seriously damage, though they cannot wreck, the credit of the state; for, while they create no valid indebtedness, yet it cannot be denied that they tarnish the reputation of the government for business integrity and fair dealing, and are greatly injurious to the public welfare.''

* * *

''It will be observed that appropriations and expenditures for ordinary purposes are legitimate so long as they do not exceed the total tax already provided by law, and applicable for their payment, or which may, within constitutional limits, be so provided for their payment within the proper fiscal year. But it must not be overlooked that tax levies are seldom or never collected in full. Hence the appropriations and expenditures for each fiscal year must, if possible, be kept below the total amount for taxes levied for such fiscal year, so as to leave a margin equal to the loss which experience has shown will occur on account of delinquent taxes; otherwise a deficit will occur in the treasury, and a constantly increasing indebtedness will inevitably result. It may be said that Section 3, Article 11, of the Constitution, was designed to provide for deficiencies of this kind. But it will not do to depend upon the remedy therein provided. It is better to avoid a

precipice than to take the risk of an injury by being too venturesome. Prevention is better than cure. At most, the relief which can be obtained under Section 3 is very small, and can never exceed $100,000. Besides, it must not be supposed that such remedy can be made available, except to provide for a valid indebtedness occasioned by 'casual deficiencies of revenue.' No appropriation or expenditure in excess of the constitutional limit, as above explained, can be thus provided for. A casual deficiency of the revenue is one that happens by chance or accident, and without design or intention to evade the constitutional inhibition."

In speaking of the same general subject, the court, in *In re Loan of School Fund,* 18 Colo. 200, said:

"According to the several provisions of our constitution, no money can be paid out of the state treasury except upon a valid appropriation; nor can a valid appropriation be made unless the revenue within constitutional limits be provided for its payment."

And in *In re Priority of Legislative Appropriations*, 19 Colo. 62, the same rule is laid down in still more positive and emphatic terms:

"The questions submitted assume that the aggregate of appropriations made by the ninth general assembly exceed the limits prescribed by Section 16, Article X of the Constitution. It is well settled by previous decisions of this court that all such excessive appropriations are absolutely void. In fact, the constitution contains such plain and explicit inhibitions against the state being burdened with debts thus created, as to leave no room for construction."

In the Parks case, *supra*, at page 91, the court says:

"The leading opinion in this state in reference to the subject was written in the case in 13 Colo. already referred to. In that case it was determined, *inter alia*, that the general assembly, is inhibited by the constitution from making appropriations or authorizing expenditures in time of peace in excess of the revenue applicable for such appropriations, and that if acts are passed attempting to authorize such expenditures, such acts are void and of no effect. * * *

"Within constitutional limits the general assembly may appropriate the public funds of the state as it

chooses, but when it has once reached the limit, further appropriations are of no force and effect, for the reason that there is no revenue available to meet such appropriations.''

It is, therefore, plain that some of the appropriations now outstanding are void, or, at least, will be void unless the present General Assembly shall provide for levying a sufficient tax to pay them. Such excessive appropriations are void because of the ''plain, simple and unambiguous'' language of Sec. 16, Art. X of the State Constitution, which, as the court says, ''need not be misunderstood'' and ''cannot be evaded.'' Such appropriations ''create no indebtedness against, and entail no obligation, legal or moral, upon the people, or upon any future general assembly.'' But the question now arises—which ones of said appropriations are void. If additional revenues adequate to cover the deficit are to be provided then this question will become unimportant, otherwise it will be of vital importance. The question may be more specifically stated, thus: 'Is it the particular excess appropriations made by the present general assembly, and which belong to the ''second'' and lower classes, that are void, or on the contrary must the classification act above quoted be so construed as to bring within its operation the continuing mill levies, and appropriations therefrom, made by former general assemblies, or voted by the people? If the latter alternative is correct, then a radically different result will be reached, as will presently appear. Unfortunately, there is no decision of our Supreme Court that affords a definite answer to this question. Our present classification act was adopted in 1913. The first act regulating the order of payment of appropriations was passed in 1897 (S. L. 1897, p. 21). That act was amended in 1899 (S. L. 1899, p. 21) and as so amended was substantially the same as the present act, except that appropriations for charitable institutions were placed in the third class, while the present act places them in the second class.

Long before the passage of any of these classification statutes, the Supreme Court had held that ''appropriations to defray the expenses of the legislative, executive and judicial departments of the state government for each fiscal year, including interest on any valid public debt, are entitled to preference over all other appropriations from the general public revenues of the state, without reference to the date of their passage, and irrespective of emergency clauses.'' (See *In re Appropriations*, *supra*, p. 328; *People v. Board of Equalization*, 20 Colo. 228; *Parks v. Soldiers' and Sailors' Home*, *supra*, 91; *Stuart v. Nance*, 28 Colo. 200.) So it appears that when the classification act put appropriations for the ''ordinary expenses of the legislative, executive and judicial departments of the state government, and interest on any public debt'' in the first class it merely gave legislative sanction to a rule already firmly established

by judicial decisions of our highest court. But that court has also held, in several instances, that, in the absence of a classification statute, all appropriations not of a preferred character are entitled to priority of payment, in the event of a deficit, in the order of the taking effect of the acts making such appropriations (see *People v. Board of Equalization,* 20 Colo. 228; *Goodykoontz v. People,* 20 Colo. 376; *Parks v. Soldiers' and Sailors' Home,* 22 Colo. 91). And in the Parks case, *supra,* p. 101, the court said:

> "It may be competent for the legislature to provide that, in case of deficiency, the public funds shall be prorated between claimants of the same grade, but certainly, in the absence of such legislation, the courts cannot require this to be done when the priority in time can be ascertained; consequently, in case of several appropriations of the same grade made by separate bills bearing the same date, and there are funds to pay part, but not sufficient for all, priority should be given as of the time of day of the taking effect of the several acts."

Now it will be noted that, while the classification act provides for the prorating, if necessary, of appropriations of the third, fourth and fifth classes, respectively, it contains no such provision as to appropriations of the second class. The statute is silent in this respect, and in the Parks case, as already seen, the court held that, in the absence of legislation providing for prorating "between claimants of the same grade * * * the courts cannot require this to be done when the priority in time can be ascertained" (22 Colo. 101).

It follows that, unless the avails of the mill levies, or some of them hereinafter referred to can be resorted to for the purpose of supplying the deficiency of revenues to pay the second class appropriations, the result would be that the second class appropriation bills would be valid in full, according to priority of their taking effect, until the aggregate amounts thereby appropriated equalled the revenues available for second class appropriations, and second class appropriation bills taking effect after such available revenues had so become exhausted would be void *in toto.*

Or, more concretely stated:

The available revenues, as per your revised estimate are	$4,633,500.00
The first class appropriations payable therefrom total	2,879,477.32
Balance available for second class appropriations	$1,754,022.68

And the second class appropriation bills would be valid, in the order of their priority of taking effect, until said balance had been exhausted, and second class appropriation bills thereafter

taking effect would be wholly void. Such a result would, indeed, be startling and disastrous in the extreme, for it would doubtless mean that some one or more of the state institutions that subsist upon second class appropriations would even now be without funds for their support.

But there remains to be examined the question, already stated, as to whether or not the scope and effect of the classification act is such as to bring within its purview, not only the appropriations made by the present General Assembly, but any continuing mill levies, and appropriations of the proceeds thereof, heretofore established by the General Assembly or by the people for specific purposes.

In *In re Continuing Appropriations*, 18 Colo. 193, the court said:

> "As to those appropriations designated in the question as 'Continuing Appropriations,' that is, those, the payment of which is to be continued beyond the next biennial session of the legislature, we see no constitutional objection thereto. The power of the legislature, except as otherwise restricted by the constitution, is plenary over the entire subject. The power can, however, only be exercised subject to the provisions of Section 16 of Article X of the Constitution, by which appropriations in excess of the revenue, are inhibited."

The Supreme Court has also held that, in the absence of a classification statute, a continuing appropriation is not a "preferred claim" but is subject to the same rule of priority that governed biennial appropriations. See *Stuart v. Nance*, 28 Colo. 204, where the Court says:

> "Counsel seem not to distinguish, at least are not disposed to admit of a distinction, between the idea of a continuing appropriation and a preferred claim; apparently supposing that a continuing appropriation is necessarily a preferred claim, and a noncontinuing or biennial appropriation, as compared with a continuing one, is necessarily a deferred claim. An illustration will serve to show the fallacy of this notion. This court has held that an appropriation for educational institutions is, in case of a shortage of revenue, postponed to an appropriation for the salaries of the officers of the three departments of government. There was, years ago, a special levy of a fractional mill tax made by statute to support the state university, and in the act providing for the levy there was also an appropriation of the revenues to be realized therefrom, which have been judicially declared continuing appropriations. Appropriations for the salaries of a number of

> the officers of the three departments are made at each session of the general assembly, and not by continuing appropriations; but a subsequent biennial appropriation for these salaries, in case of a shortage of revenues, would take precedence over a prior continuing appropriation for the state university. So it will be seen that there may be a clear distinction between a continuing appropriation and a preferred claim against the revenues of the state."

The classification act has never been construed by our courts nor has its validity ever been judicially determined. In the Stuart case, *supra*, p. 204, the court said that the rule of priority does not apply to preferred appropriations and that it "applies to subsequent or deferred appropriations only in case the general assembly has not otherwise *legally* provided." This, of course, is far from holding that the present classification act or its predecessor is valid. In speaking of the act of 1897, as amended in 1899, Attorney General Campbell remarked that "there may be some question as to its validity," but he concluded that it was the duty of executive officers to act upon the presumption of its validity and to strictly obey its terms (Biennial Report, Attorney General, 1899-1900, p. 227). The classification act makes no express exception in behalf of continuing appropriations, nor in my opinion can it be said that it contains any such implied exception; and since in the Stuart case, *supra*, it was held that such appropriations are not necessarily preferred claims, I shall assume, not only the validity of the classification act, but that it comprehends all appropriations whether continuing or biennial only. Such was the construction placed by Mr. Campbell upon the similar act of 1897 in the opinion above referred to. He there says, at page 234:

> "If, after the payment of all first class appropriations in full, it should be found that in any fiscal year the revenues are insufficient to meet appropriations falling within the second class, the mill levies for the Mute and Blind, University, Agricultural College, School of Mines and Normal School, falling within the third class, as well as the stock inspection mill levy in the fourth class and capitol building mill levy in the fifth class, must be drawn upon, so far as necessary, for the purpose of meeting the deficiency in the second class. If, after drawing upon the proceeds of said mill levies in the third, fourth and fifth classes, sufficient funds should be derived with which to meet all second class appropriations, whatever sum remains of the proceeds of said third, fourth and fifth class mill levies would then be applicable to the payment of third class appropriations, and, if necessary, should be prorated among the said third class institutions."

If I am correct in the premise that the classification act applies to the continuing appropriations from mill levies for specific purposes, it becomes necessary to assign those appropriations to their respective classes as determined by that act. Here again, grave difficulties arise mainly because of the ambiguity of that statute, as above pointed out. And it may be said at once that it would require a decision of the Supreme Court to finally determine the effect of that statute as applied to the present exigency.

Relative to the mill levies mentioned, the office of the Auditor of State has supplied the following data:

TENTATIVE LEVY FOR ALL STATE PURPOSES

For Year 1927, Based on Valuation for 1926 of $1,545,948,315.00

		From 4 Mill		From Additional Mill	Total
	General Revenue*	0.4368065			0.4368065
(1)	University	.27144	(24)	.2484490	.5198890
(2)	Agricultural College	.13572	(25)	.1247040	.2604240
(3)	Colorado Agricultural Expt. Station	.04250	(26)	.0292150	.0717150
(4)	Fort Lewis School	.02000	(27)	.0291920	.0491920
(5)	School of Mines	.08822	(28)	.0709620	.1591820
(29)	School of Mines Expt. Station			.0161600	.0161600
(6)	State Teachers College	.13572	(30)	.1247040	.2604240
(7)	Western State College	.05000	(31)	.0504375	.1004375
(8)	Mute and Blind	.09572	(32)	.0445000	.1402200
(33)	University Medical School			.1000000	.1000000
(34)	Adams State Normal			.0500000	.0500000
(9)	Colorado State Hospital	.26822			.2682200
(10)	Stock Inspection	.03333			.0333300
(11)	Capitol Building	.10000			.1000000
(12)	Capitol Office Building	.12000			.1200000
(13)	State Road	.50000			.5000000
(14)	State Fair	.03000			.0300000
(15)	Improvement Tax on State Property	.01500			.0150000
(16)	Interest Funding Bonds 1910	.03000			.0300000

*5% added to 1926 levy.

(17) Interest Insurrection Bonds 1909-14	.02800		.0280000
(18) Interest Highway Bonds 1921	.16500		.1650000
(19) Sinking Fund, Highway Bonds, 1921	.16500		.1650000
(20) Sinking Fund Bonds 1910	.03300		.0330000
(21) Sinking Fund Bonds 1909	.12500		.1250000
(22) Military	.07000		.0700000
(23) School Fund Reimbursement	.02300		.0230000
	2.9816765	.8883235	
		2.9816765	
TOTAL STATE LEVY		3.8700000	3.8700000

It will be observed that, aside from the levy for "general revenue," there are 34 of these levies. The levy for "general revenue" is fixed annually by the State Board of Equalization. The rate of each of these respective levies is determined by the statutes authorizing them, read in conjunction with the so-called "levy limiting act" hereinafter mentioned, in all cases where that act is applicable. For convenience of reference these 34 levies are numbered.

My conclusions as to the classification of the appropriations derived from these levies are as follows:

Numbers 1, 2, 3, 4, 5, 6, 7 and 8 are clearly "for educational institutions" and therefore fall in the third class.

Numbers 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 are likewise "for educational institutions" and would also fall in the third class; but these levies are, by the respective statutes creating them, expressly declared to represent fractions of the "additional levy of not to exceed one mill" authorized by Sec. 11, Art. X of the Constitution for the special purposes of "erection of additional buildings at, and for the use, benefit, maintenance and support of the state educational institutions," and I therefore conclude that none of the proceeds of these levies could lawfully be diverted to any other purpose, so they will hereafter be disregarded.

Number 9 clearly falls in the second class, and in view of the conclusions reached in this opinion need not be further considered.

Number 10 is a levy authorized by Section 3226 C. L. 1921, and the avails thereof are by Section 3227 C. L. 1921 designated as the "inspection fund" sometimes called the "stock inspection fund." This fund is or may be used to pay the salary and expenses of (1) the State Veterinary Surgeon, Section 3178 C. L. 1921; (2) the salary of the secretary and assistant secretary of the State Board

of Stock Inspection Commissioners, Sections 3174 and 3176, C. L. 1921; and (3) the salaries of the Chief Brand Inspector and the regular and Special Brand and Sanitary Inspectors appointed by said board, Section 3177, C. L. 1921.

In view of the important police powers devolved by our statutes upon said board, and of the fact that this fund is used to pay the salaries of officers or employees of that board, I am of the opinion that this appropriation is of the first class, although Mr. Campbell, in his opinion above quoted assigned it to the fourth class (see p. 253). This appropriation is for purposes similar, from a legal standpoint, to those for "bee inspection," and "pest inspection," which have usually been regarded as of the first class. In support of the conclusion stated I also refer to the opinion of the court in the Parks case, *supra.*

Number 11 is a levy for the replenishment from time to time of the "capitol building fund to be disposed of as the general assembly may direct." (Sec. 405, C. L. 1921.) Appropriations out of this levy for the current maintenance of the capitol buildings would doubtless fall in the first class. This levy will yield about $300,000 during this fiscal period, and H. B. No. 81 appropriates $311,225 therefrom for current maintenance and improvements during the period. At the close of the last fiscal period there were outstanding warrants payable out of this fund in the amount of about $40,000. None of the revenues derived from this levy would be available to pay appropriations of a lower class.

Number 12. This levy was authorized by H. B. No. 82, approved February 26, 1927. Chapter 165, S. L. 1919 authorized the Board of Capitol Managers to "begin the construction of an office building," and provided for a levy of .12 of a mill in 1919, 1920 and 1921 and appropriated the proceeds thereof, so far as necessary, for such purpose, and further, that the said revenues should be credited to the "Capitol Building Fund." Section 5 of the Act authorized and directed the Auditor of State to issue interest-bearing "Certificates of Indebtedness" against the fund derived from said levies, but provided that "in no event shall the total amount of said certificates exceed the amount hereby appropriated." Chapter 222, S. L. 1921 authorized and directed said board "to complete the construction of the office building," and to equip the same. Section 3 of said chapter provided for a levy of .12 of a mill in 1922, 1923, 1924 and 1925, said taxes when collected to "be paid to the credit of the capitol building fund." Said section also provided that "The entire fund derived from such levy each year or so much thereof as may be necessary, is hereby appropriated for the purpose of carrying out the provisions" of said chapter. Section 4 authorized and directed the Auditor of State to issue interest-bearing "Certificates of Indebtedness" against the funds derived from said levies, but provided that "in no event shall the total amount of said certificates exceed the amount hereby appropriated.

Each of said acts last mentioned provided that "the faith and credit of the state is hereby pledged for the payment of principal and interest of said Certificates of Indebtedness." Said H. B. No. 82 amends Section 3 of said Act of 1921, by providing that a like levy of .12 of a mill shall be made in 1927, to "be paid to the credit of the Capitol Building Fund," and appropriating the avails of such additional levy, "or so much thereof as may be necessary," for the purposes of carrying out the provisions of said Act of 1921. It will thus be noted that while each of these three acts provides that the moneys derived from the respective levies thereby authorized shall be "paid to the credit of the Capitol Building Fund," none of them appropriates anything more than the proceeds of these special levies themselves for the construction or equipment of the office building. I am advised that, in the course of the construction and equipment of the office building, warrants were issued in excess of the revenues derived from the levies authorized by said Acts of 1919 and 1921, respectively, and that such excess warrants aggregate the approximate total of $165,000. The purpose of the additional levy of 1927 was to raise funds to retire such excess warrants. The validity of these excess warrants, and of this new levy is, to say the least, doubtful, and it may be that the State Board of Equalization will not recognize this levy when it is called upon to fix the respective levies for 1927. Because of the important private rights involved, I shall not pass upon this question now. If valid at all, I think this levy should be assigned to the first class. (*People v. Board of Equalization, supra,* p. 230).

Number 14. This levy was authorized by H. B. No. 21, approved April 4, 1927, which appropriates the proceeds thereof "for the payment of cash premiums for live stock, industrial, horticultural and agricultural exhibits, and the expenses of judges and superintendents of such exhibits; the traveling and actual expenses of the members of said (Colorado State Fair) commission, the annual salaries of a manager and caretaker, the maintenance of an office, and for program attractions, repairs, buildings and improvements." There is ample room for doubt as to the classification of this item, but I am advised that appropriations for the current support of the state fair have usually been assigned to the third class, and I am not prepared to say that such classification is incorrect.

Number 15. This is a levy provided for by Section 415, C. L. 1921, "To provide for the payment of special assessments for local improvements on properties of the State of Colorado in the City and County of Denver." This levy, in my opinion, belongs to the first class.

Numbers 16, 17, 18, 19, 20 and 21 are levies for the payment of principal and interest of bonds heretofore issued by the state. Numbers 17 and 21 are authorized by Sections 347 and 355, C. L. 1921; numbers 16 and 20 by Section 7, Chapter 148, S. L. 1909; and

numbers 18 and 19 by Sections 376 and 377, C. L. 1921. The classification act places appropriations for "interest on any public debt" in the first class. Moreover, Section 4 of Article XI of the Constitution provides that "in no case shall any debt above mentioned in this article be created except by a law which shall be irrepealable, until the indebtedness therein provided for shall have been fully paid or discharged; such law shall * * * provide for the levy of a tax sufficient to pay the interest on and extinguish the principal of such debt * * * and the funds arising from the collection of any such tax shall not be applied to any other purpose than that provided in the law levying the same," etc. So it is apparent that none of these six levies can be drawn upon to supply the present deficit.

Number 22. This levy is established by Section 244, C. L. 1921, and the funds derived therefrom are by Section 245 appropriated "to the support and maintenance of the state military fund." Sec. 16 of Art. X expressly excepts from its operation "appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war." In my opinion this appropriation, though applicable to the maintenance of the military establishment in times of peace, as well as of war, stands in a class by itself, and could in no event be diverted to cover deficits of revenue to supply ordinary appropriations. (See *In re Appropriations*, *supra*, and *In re State Board of Equalization*, 24 Colo. 446.)

Number 23. This levy is made pursuant to Chapter 167, S. L. 1923, which provides, in brief, that when the State Board of Land Commissioners buys in at foreclosure sales lands whereon it has loaned moneys belonging to the "school funds of the state," such lands shall not be regarded as a part of the public school lands, but that general taxes shall be levied in such amounts as shall be necessary to reimburse the school fund for the aggregate amount of such loans, and that such taxes, when collected, shall be credited to the school fund. The school lands were donated to the state, by the enabling Act, "for the support of common schools." They form a trust estate dedicated to this specific object. Sec. 3, Art. IX of the Constitution provides that "The public school fund of the state shall forever remain inviolate and intact * * *. 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 same section provides that "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 General Assembly, in making the proceeds of this levy a part of the inviolable school fund clearly indicated its purpose that this appropriation should never be diverted to any other object, and it will therefore be put aside.

Number 13. Consideration of this levy has been deferred because of special features rendering its classification unusually difficult. This levy was provided for by an act adopted by the people in 1914 under the initiative provision of the Constitution. The declared object of the act was to perpetuate the "State Road Fund," created by Chapter 88, S. L. 1913, "for the purpose of state aid in the construction, maintenance and repair of public highways." (Secs. 1419-1420, C. L. 1921.)

This appropriation clearly falls in either the first or fourth class. And it is highly important to know in which of these it belongs. The Supreme Court, in several instances, declined to pass upon questions of priority or validity of appropriations because the various state institutions that were beneficiaries thereof were not before the court (See *In re Appropriations, supra*, p. 328; *People v. Board of Equalization, supra*, p. 232; *In re Board of Equalization, supra*, p. 454.) I hesitate to decide a question so vital to the State Highway Department on the one side and the state educational institutions on the other, for the matter is one that should be determined by the Supreme Court, with the institutions affected before it. I shall, however, express my best judgment upon it. That the building of public highways is a legitimate function of the state government there can be no doubt. But such enterprises have only an indirect relation to the well-recognized primary purposes of government. Indeed the building of highways was, until very recent years, left almost entirely to local agencies. This is true not only of Colorado but of many other states. In my opinion, this levy must be assigned to the fourth class. It has already been shown that this levy was voted by the people, and not by the General Assembly. The classification act provides that if the revenues are not sufficient to meet "all the appropriations *made by the General Assembly,*" etc., "*such* appropriations shall be paid in the prescribed order." Does this act, then, include an appropriation made by an initiated act approved by the people? I think it does. An initiated act is of no higher dignity than an act of the general assembly, for that body may repeal an initiated act (see *In re Senate Resolution,* 54 Colo. 262). True, the classification act uses the words "General Assembly" but it is the spirit and reason of the act that should control (36 Cyc. 1108), and no reason appears for excluding from the operation of the act an appropriation made by an initiated statute. Sec. 6520, C. L. 1921, provides that "all general provisions, terms, phrases and expressions, used in any statute, shall be liberally construed, in order that the true intent and meaning of the General Assembly may be fully carried out." It has been held that the term "assessor," as used in our revenue act, means "the assessing power, whoever that may be." The court there said: "The statute should be construed according to its spirit to effect its purpose," *County Commissioners v. Floaten*, 66 Colo. 540.

The general conclusion, then, at which I have arrived is that the revenues derived from the nine third class mill levies above named may be drawn upon, so far as necessary, for the purpose of meeting the deficiency in the second class. And that the fourth class levy may, in turn, be drawn upon to reimburse the beneficiaries of said third class levies for the contribution so made by them in supplying the deficiency in the second class, and any balance of revenues raised by said fourth class levy would be available to pay third class appropriations made by the present General Assembly, and if all second and third class appropriations were thus paid in full, any balance raised by said fourth class levy would have to be prorated among all fourth class appropriations. Or the same practical result would be reached by leaving the proceeds of the nine third class levies undisturbed, and using the proceeds of this fourth class levy—the half mill state road levy—to pay (1) the deficiency in the second class appropriations, (2) the third class appropriations that are not provided for by mill levies, and (3) to pay pro rata all fourth class appropriations.

This final result, I realize, is somewhat surprising, and difficult to accept, because it means that the proceeds of a fractional mill levy voted for a specific object would be diverted to wholly different objects. Otherwise stated—it means that it is *not* the specific excessive appropriations that were made by the present general assembly that are void. It means rather that the present general assembly, by its excessive appropriations of the *second* and *third* classes, has crowded out and rendered void, or void *pro tanto,* the *fourth* class appropriation of the proceeds of this half mill levy voted in 1914. But why, it will be asked, can the proceeds of a levy for a specified purpose be used for other purposes? The answer is that the classification act is one relating to appropriations, and must be considered as *in pari materia* with all statutes making appropriations. And that act, by requiring all appropriations within its purview to be paid in a prescribed order, has had the result, not of nullifying any of the mill levies above mentioned, but of diverting the avails of some of them to other objects than those for which they were voted. Our Supreme Court has recognized that there is a distinction between a mill levy and an appropriation of the funds realized from it, even though the levy and the appropriation are provided for by the same statute. (See *People v. Board of Equalization, supra,* p. 232.) Section 16, Article X of the Constitution, as quoted above, prohibits appropriations whereby the expenditures of the state, during any fiscal year, "shall exceed the total tax then provided for by law, *and applicable for such appropriation or expenditure,*" etc., and superficially it would appear that if the appropriations made by any General Assembly exceeded the revenues *not already dedicated to other purposes, such specific excess appropriations would be void,* but the effect of the classification act is to *make applicable* for such appropriations any

outstanding mill levies the appropriations from which are of a lower class by virtue of such classification act; so the final result is that it is not necessarily the particular excess appropriations that happen to be made at any given session of the general assembly that are void, but rather the result may be, and is in this instance, that an older appropriation is rendered void, or partially so, simply because it falls in a lower class, than many of those that have given rise to the present deficit.

It will, of course, be understood that this opinion deals mainly with general rules and principles that seem to govern the present situation and that, if no new revenues are provided, and it thereby becomes necessary to rearrange the state finances along the lines above indicated numerous questions of detail may arise that may demand further consideration. It will also be understood that upon many debatable points covered hereby I have sought in vain for authoritative guidance of the Supreme Court, and conclusions upon such matters are necessarily not of a final character.

Such, in brief, are the conclusions of this department as to the principal legal results that flow from the deficit.

The question will doubtless be asked: "Why not let matters remain as they are and issue certificates of indebtedness from time to time, as need arises, to supplement the revenues and let the next general assembly levy taxes to pay them?" The answer is that such a course would be unlawful. Sec. 304, C. L. 1921, provides that the Governor and the Attorney General may authorize the issuance of certificates of indebtedness "in all cases where the laws recognize a claim for money against the state and no appropriations shall have been made by law to pay the same," and that "no indebtedness shall be incurred, or no certificate of indebtedness issued, for any purpose for which an appropriation has been made and exhausted, unless the necessity for the creating of such indebtedness, and the issuing of such certificate, is caused by a casualty happening after the making of the appropriation." But, as stated by Mr. Campbell (report Attorney General, 1899-1900, p. 172), "The legislature being inhibited by the Constitution from making appropriations or authorizing expenditures in excess of the revenues, it follows as an elementary proposition that the legislature cannot, by statute, lawfully empower the chief executive to authorize expenditures in excess of the revenues."

If it be suggested that the State Board of Equalization, at its October meeting in 1927 and 1928, raise the levy for general revenue sufficiently to provide the additional revenue needed, it must be answered that such cannot be done without an amendment to the so-called "levy limiting act." That act provides, *inter alia*, that "all statutory rates, making provisions for the general revenues of the state and for state institutions, schools, towns, cities, and for all other purposes * * * are hereby so reduced as to prohibit the levying of a greater amount of revenue for any year hereafter than

was levied the preceding year, plus five per cent'' (S. L. 1923, p. 542). The five per cent increase in general revenue allowed under this statute has already been included, as I am advised, in your estimates of available revenues for the period.

It is hardly for this department to make recommendations as to what should be done to meet the present situation. I may, however, offer suggestions as to what might be done. And here again some apt words of the Supreme Court may be used: ''The remedy for the evils from which the state suffers lies with the legislature, which, in our judgment, it may give, and still observe all constitutional limitations'' (25 Colo. 301).

It is obvious that the present emergency could be met by such an amendment to the levy limiting act as to allow the State Board of Equalization to add to the levy for general revenue in 1927 and 1928 such fractional part of a mill as would be necessary to cover the deficit. An addition of approximately two-fifths of one mill for each of the two years of the present fiscal period would be all that would be required to effect this result. Realizing that a deficit was sure to arise unless some additional revenues were provided to meet the growing requirements of the state institutions wherein the inmates are involuntarily confined, this office, early in the session of the present general assembly prepared in skeleton form, and suggested the introduction of a bill to so amend the levy limiting act as to provide this additional fractional millage for the current period only. The bill was never introduced, or, if introduced, was never brought to the attention of the House of Representatives. The general levy for state purposes is limited by the constitution to four mills, except that in 1920 the people authorized an additional mill for the benefit of state educational institutions. As shown by the foregoing tabulation, the present levy for state purposes, aside from the levies charged against said additional mill, is a little less than three mills, so there would be ample room for the slight increase that would be necessary to meet in full the requirements of this biennium.

The fact is that the state now has an assessment roll of approximately $1,545,000,000. The increase in valuation since 1919 has been about $50,000,000 only. Yet the requirements of the state and its numerous institutions have grown very considerably in that brief period. The constitution has wisely set a limit of four mills upon state taxation of property for general purposes. That limit will soon be reached unless new sources of revenue are found. Moreover, it is realized by all that taxes upon property, and especially upon tangible property, have already become, in many communities of the state, an almost intolerable burden. By far the larger part of such taxes are for local purposes, the total state levy being now about three and eighty-seven hundredths mills, as against total levies of from twenty mills upwards for state *and* local purposes together, the total rates, of course, varying enormously in the re-

spective communities and sections of the state. The National Government has set a most commendable example in tax reduction, through the enforcement of rigid economies in all lines of administration. The state should adopt a similar policy and rigidly adhere to it. The local governments should do likewise. Not only should earnest efforts be made to prevent any permanent increase in *ad valorem* taxation, but ways and means should be devised and applied to materially reduce this burden upon the property and industries of our state. As a step in this direction, this office prepared a bill providing for an excise tax upon sales of cigarettes, and advocated the enactment thereof by the present general assembly. This bill was based upon the Iowa law which has been for several years in successful operation in that state and is producing very substantial amounts of revenue. The scope of such a law, could, of course, be broadened to include cigars and tobacco in other forms, as well as cigarettes. This is but an illustration of what could be done, in the line of indirect taxation of luxuries, to the ultimate substantial relief of tangible property of part of the excessive burden it is now required to bear. It may be objected that taxes of the kind suggested would be "nuisance" taxes and therefore unpopular. But property taxes which in some of our communities have become almost confiscatory in amount, are also "nuisance" taxes in a much more real and serious sense than such excise taxes could ever be. In a word, our general assembly, guided by a considerate and enlightened public opinion must work out such a revision of our taxing system as will produce adequate revenues for the support of state and local goverment, and remedy, at the same time, so far as possible, the most pronounced inequalities of the present system.

I shall not close this letter without acknowledging my obligations to your department, and especially to your Mr. Noonan, for data supplied and assistance rendered in assembling the figures required to be used herein.

Respectfully submitted,

WILLIAM L. BOATRIGHT,
Attorney General.

CHARLES ROACH,
Deputy Attorney General.

146. SCHOOLS

To Leslie Paull, June 24, 1927.

Sec. 8323, C. L. 1921, provides a limit on the amount of land a school district may acquire by the exercise of the right of eminent domain, but does not restrict the amount that may be acquired by purchase for school purposes.

147. SCHOOLS

To Mrs. O. E. Wing, June 29, 1927.

The school board has the power to determine the number and location of the schools.

The statute makes no provision as to the number of children required to secure a school.

148. SCHOOLS

To Mrs. Florence Ellis, June 30, 1927.

Board of Directors of third class district have no power to build a school house without authorization by vote of electors.

149. MILITARY DEPARTMENT

To Alphonse Ardourel, April 23, 1927.

Under Sec. 19, Ch. 183, S. L. 1921, the Adjutant General may require bonds from all disbursing and distributing officers of his department and other officers in charge of public property, providing for malfeasance or misfeasance in office and for the accounting for all property of the department over which the bonded officer has control.

150. PENITENTIARY

To Hon. Charles J. Moynihan, July 12, 1927.

The Colorado Board of Corrections has power to grant good time allowances in excess of ten days, under Sec. 758, C. L. 1921.

151. COUNTIES

To Frank Tafoya, July 12, 1927.

Under the ruling of the Colorado Supreme Court in *County Commissioners vs. Union Pacific R. R. Co.*, 63 Colo. 143, a county clerk can make out and sign warrants for expenses in excess of annual appropriation.

152. SCHOOLS

To Estella Davis, July 12, 1927.

The only elections at which those voting must be taxpayers are elections to vote on incurring a bonded indebtedness.

153. COUNTY TREASURER

To J. L. Beaman, July 14, 1927.

A county treasurer may not go out of his county to distrain personal property for non-payment of taxes, where the property

has been removed from the county in which taxed. The sheriff of the county in which property is found is the proper officer to serve distraint warrant in such case.

154. LUNATICS

To Richard A. Toomey, July 14, 1927.

It is possible that in this state the marriage of a mental incompetent is voidable rather than void.

155. FIREMEN'S PENSIONS

To A. L. Taylor, July 18, 1927.

To be eligible for pension a fireman must have served twenty years as a member of a *paid* department; service in volunteer company is not considered.

156. COUNTY TREASURER

To Carl C. Hearnsberger, July 18, 1927.

A county treasurer is not entitled to commission for collection of state taxes.

157. SCHOOLS

To Mrs. M. S. Donegan, July 18, 1927.

A county superintendent is not entitled to use mileage expense for travel outside of county in attendance upon conventions and conferences.

158. STATE ENGINEER

To C. C. Hezmalhalch, July 19, 1927.

The expenses of the special deputy state engineer for the La Plata River Compact may be paid out of the appropriation for the protection of state streams.

159. INDUSTRIAL COMMISSION

To Thomas Annear, June 14, 1927.

By omitting the necessity of an appropriation for expenditures of the State Compensation Insurance Fund for operating expenses, including salaries, and by omitting to, provide for the approval of the Auditing Board, it is unnecessary, under H. B. 456, to submit those items to the Auditing Board for approval.

160. INDUSTRIAL COMMISSION

To Thos. Annear, July 22, 1927.

The offices of Secretary and of Referee of the Industrial

Commission are civil offices and may not be filled by members of the legislature under Sec. 8, Art. V, of the Constitution.

161. MOTOR VEHICLES

To Charles M. Armstrong, July 22, 1927.

The Secretary of State has no authority to exempt from registration and payment of statutory fees automobiles owned by the military personnel on duty at Fort Logan.

162. CIVIL SERVICE

To Civil Service Commission, July 23, 1927.

The additional qualifications required of the inspector of coal mines provided for in H. B. No. 456 are so numerous, substantial and important as to put the position in a different class from that of Coal Mine Inspectors under the Coal Mining Act.

The Civil Service Commission should hold a competitive examination for the purpose of establishing an eligible list from which a permanent appointment to this position could be made.

163. CITIES AND TOWNS

To W. J. Hyrup, July 26, 1927.

The Board of Trustees of a town have no authority to donate town funds in aid of litigation over school districts.

164. CITIES AND TOWNS

To R. W. McGuirk, July 28, 1927.

A town may appropriate money for the purpose of advertising its resources and advantages.

165. JUNIOR COLLEGES

To Hon. Chas. A. Lory, July 29, 1927.

Any contract between a Junior College and the State University, the State Teachers' College, or any other state institution, is void.

166. ANIMALS

Under the statutes of this state managers and promoters of activities, exhibitions, entertainments or contests wherein dumb animals are wilfully injured, tortured, tormented, harassed or otherwise subjected to cruel treatment and willful spectators of such activities and those willfully making wagers or bets upon any result thereof, are accessories and equally guilty with the actors and performers taking part in such activities.

To E. K. Whitehead, July 29, 1927.

Dear Sir:

We have your favor of the 16th inst. in re rodeos, wild west shows, endurance races, and other forms of entertainment in

which dumb animals are used, and necessarily abused, maltreated, subjected to acts of cruelty, and in which you quote from Sec. 7035, C. L. 1921, defining the words "animal," "torture," "torment," and "cruelty."

You ask this office to rule on whether such exhibitions as those described and such features of exhibitions are not unlawful because of their inherent cruelty and certainty of injury and regardless of whether the injuries complained of are caused by intent, by accident or as a natural result of the character of the exhibition itself.

You also ask us to rule on whether the promoters, procurers, managers and backers of such exhibitions and those who induce, procure and pay for such exhibitions to be given, including their sponsors and those whose encouragement causes them to be given are not also criminally responsible under the law, together with the actual performers and actors in them.

Your inquiry opens a wide field and leads us into an examination of the law governing accessories.

In the statutes of the State of Colorado cruelty to animals is listed among the crimes defined in Chapter 153, C. L. 1921, entitled "Crimes, Criminal Procedure and Proceedings of a Criminal Character." Sec. 6645, found in said chapter, defines an accessory as follows:

> "An accessory is he or she who stands by and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised and encouraged the perpetration of the crime. He or she who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal and punished accordingly. An accessory during the fact is a person who stands by, without interfering or giving such help as may be in his or her power to prevent a criminal offense from being committed; Provided, That an accessory during the fact shall be a competent witness unless disqualified from other causes."

This section defines an accessory as one who aids, abets, assists, advises or encourages the commission of a crime, and in our opinion the commission of a crime is encouraged by one who promotes or manages an entertainment, exhibition or contest where the activities or sports indulged in include the willful infliction of torture, torment, injury or cruelty upon an animal or animals, even though such promoter or manager takes no personal part in such activities.

Sec. 7022, in the chapter referred to, reads as follows:

> "Every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, de-

> prives of necessary sustenance, unnecessarily or cruelly beats, or needlessly mutilates or kills, or carries in or upon any vehicles, or otherwise in a cruel or inhuman manner, any animal, or causes or procures it to be done, or who, having the charge and custody of any animal, unnecessarily fails to provide it with proper food, drink, or protection from the weather, or cruelly abandons it, shall, upon conviction, be punished by imprisonment in the county jail not exceeding one year, or by fine not less than ten dollars, nor more than two hundred and fifty dollars, or by both such fine and imprisonment."

This section covers cruelty to animals, including *torment* and *torture,* and makes guilty of a criminal act, every person who commits or *causes* or *procures* to be committed, any of the acts forbidden. This, it would seem to us, is broad enough to include the promoters and managers referred to.

Sec. 7040, in such chapter, reads as follows:

> "It shall be unlawful for any person to cause, procure, encourage, aid or abet any dumb animal to fight or engage in combat, or to cause, procure, encourage, aid or abet to be set down or released any captive dumb animal to be shot at or for dogs to pursue or to be in any other manner injured, frightened or harassed for sport or amusement or upon a wager or for the purpose or result of making bets upon the progress or result of such fight, combat, shooting, pursuit or other injury or affright."

This section makes it unlawful for any person to cause, procure, encourage, aid or abet, in any manner, the *injury, frightening,* or *harassing* of any dumb animal for sport or amusement, and this also, it seems to us, is broad enough to include managers and promoters of such sports and amusements.

Our statutes go even further on the line we are pursuing as we find in the chapter referred to, Sec. 7041, which reads as follows:

> "Any person willfully a spectator of or making bets or wagers upon the progress or result of any such fight, combat, shooting, pursuit or other injury or affright shall be deemed and held to be an accessory and shall be punished as a principal."

This section is especially specific and drastic, and put spectators of the amusements and entertainments under consideration and those making bets on the results thereof, on a par with the

performers and those actually taking part in the infliction and perpetration of torture, torment or cruelty upon dumb animals.

You refer in your letter to the matter of the possibility of the injury to a dumb animal being attributed to "accident," and as to this we are referring you to Sec. 6643, C. L. 1921, which provides that to negative a criminal charge on the ground of accident, it must satisfactorily appear that there was no evil design or intention, or *culpable negligence*, and in case of any of the activities referred to it seems to us that it would be an extremely hard matter to substantiate such a claim.

In conclusion we are of the opinion that under the statutes of this state, managers and promoters of activities, exhibitions, entertainments or contests wherein dumb animals are willfully injured, tortured, tormented, harassed, or otherwise subjected to cruel treatment, and willful spectators of such activities, and those willfully making wagers or bets upon any results thereof, are accessories and equally guilty with the actors and performers actually taking part in such activities.

However, our discussion of this matter has been general only, and the question as to whether any specific act amounts to a violation of the law is a question of fact, or a mixed question of law and fact, which should be submitted to the district attorney and by him determined.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

A. L. BEARDSLEY,
Assistant Attorney General.

167. SCHOOLS

To Moulton Chambers, Aug. 3, 1927.

After a school district has exercised the franchises and privileges of a district for one year, the legality of its organization can not be questioned.

168. SCHOOLS

To C. R. Johnson, Aug. 6, 1927.

A school district is without power to issue its bonds to erect branch high school buildings for county high school district.

169. STATE OFFICERS

To Public Utilities Commission, Aug. 6, 1927.

Inspectors appointed pursuant to H. B. 430, approved April 30, 1927, are civil officers under this state, and members of the legislature are not eligible for appointment as such inspectors.

170. SCHOOLS

To Miss Mary M. Young, Aug. 6, 1927.

C. L. Sec. 8308 provides for the creation of new districts while C. L. Sec. 8310 provides for the annexation of new territory to a district already organized.

When a county superintendent has exercised her judgment and called a meeting under the provisions of Sec. 8308, the call for meeting may not be revoked.

171. CIVIL ENGINEERS

To C. C. Hezmalhalch, Aug. 9, 1927.

In renewing the license of a civil engineer which has been delinquent for one or more years but twice the normal fee for the renewal of a license may be charged.

An unlicensed employee of a civil engineer may not be placed in responsible charge of design or supervision.

A state employee who changes his position in the state must take out a license.

172. COUNTIES

To Albert Horton, Aug. 9, 1927.

H. B. 255, 26th General Assembly, does not give banks the right to deduct the premiums for depository bonds from the 2% interest paid on county deposits. The bond premium is not such charge as may be imposed by the clearing house in such cases.

173. COUNTIES

To Clarence M. Smith, Aug. 10, 1927.

C. L. Sec. 3740 gives to the county commissioners the right to exact a license fee from theaters and other places of amusement but such license does not of itself permit the operation of such establishments on Sunday.

174. OFFICERS

Expenses of state officers, when attending conventions or attending to state business outside of state may properly be paid out of the general incidental fund provided for by Sec. 34 of the General Appropriation bill, when so directed by the State Auditing Board.

To H. E. Mulnix, Aug. 12, 1927.

Dear Mr. Mulnix:

In your letter of the 9th inst. you request my opinion "as to the legality of paying expenses of officers out of the general incidental fund when attending conventions or transacting state business outside of the state." Section 34 of the General Appropria-

tion Bill for the present fiscal period appropriates the sum of $10,000.00 "to provide for emergency, incidental and contingent expenses, including printing, postage, stationery, supplies, telephone, express and miscellaneous items, available for any or all of the departments, bureaus and offices of the state."

This fund is clearly subject to the control of the State Auditing Board because of the fact that it is appropriated among other things for contingent and incidental expenses of the various departments, bureaus and offices of the state. I am therefore of the opinion that expenses such as you mention may lawfully be paid out of this fund when so directed by the State Auditing Board.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
CHARLES ROACH,
Deputy Attorney General.

175. BLIND BENEFIT LAW

To Commission for Blind, Aug. 16, 1927.

Appropriation for operating expenses may not be used for the construction of new buildings for work-shop, although a small part might be used properly for minor changes and adjustments in present workshop.

176. COAL MINE INSPECTION

To Jas. Dalrymple, Aug. 17, 1927.

All expenses of this department including salaries and traveling expenses are paid by State Treasurer on vouchers signed by the Governor and the Coal Mine Inspector.

177. STATE BOARD OF LAND COMMISSIONERS

The State Board of Land Commissioners has no right to permit the redemption of an investment before it is either optional or due.

To Hon. Harry E. Mulnix, Aug. 18, 1927.

Dear Sir:

In your letter to this office of the 16th inst. you state that as custodian of the Public School Fund your office holds $8,000.00 of bonds of the Town of Limon, Colorado, which are neither due nor optional. You further state that the Town of Limon desires to redeem these bonds and that you have received instructions from the State Board of Land Commissioners to cancel and return the bonds upon the payment to you by the Town of Limon of the amount necessary to redeem the bonds. You then ask our opinion as to whether or not the State Board of Land Commissioners has

a right to permit such redemption of an investment prior to the date when it is either optional or due.

We advise you that in our opinion the State Board of Land Commissioners does not have the right to permit the redemption of an investment before it is either optional or due as it is being attempted in the case which you mention. Section 8298, C. L. 1921, empowers the State Board of Land Commissioners to invest the school funds of the state in certain specified securities but neither that section nor any other section of the Colorado statutes, so far as we are aware, authorizes that board to sell or permit a change in an investment which has once been made and to hold that the board has such power would be to put a strained and unreasonable interpretation on Section 8298. Indeed, if the legislature had intended to permit such practice, it undoubtedly would have given the board such authority in plain and unmistakable language. Fortunately, we have been able to find a decision bearing precisely on this question. The Supreme Court of Nebraska in a decision reported as *In re School Fund,* 15 Nebr. 684, had the same problem before it as is presented here and ruled that after the Nebraska Board of Educational Lands and Funds had once made an investment of the school funds of that state it could not change the investment from one security to another. The Court said on page 687, et seq.:

> "The authority given by the statute to the board is simply to direct investments of the money on hand in certain specified securities, not to change investments, when once made, from one security to another. If the legislature had intended that such changes might be made, doubtless the power to make them would have been clearly expressed, and not left to a forced construction of the statute. Where, however, securities in which investments have been made mature, and the money is returned to the fund, it is then within the control of the board for reinvestment."

In our opinion the State Board of Land Commissioners is not authorized to allow the redemption as it proposes to do.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

JEAN S. BREITENSTEIN,
Assistant Attorney General.

178. COAL MINE INSPECTION

To Hon. Grant Sanders, Aug. 18, 1927.

Fire bosses are required in all mines regardless of the number of employees.

179. STATE BOARD OF AGRICULTURE

Funds derived from the sale of lands under Act of Congress, 1862, must be invested by the State Board of Agriculture in municipal or school district bonds or in farm loans yielding not less than 5% interest, but can be invested in a security of one of these classes yielding less than 5% when no security can be obtained in any of the three classes which will yield 5%.

To Charles A. Lory, Aug. 19, 1927.

Dear Dr. Lory:

Your letter of the 22nd ult., relative to the investment by the State Board of Agriculture of funds derived from the sale of lands under the Act of Congress of 1862, has been received. This question has been given very careful consideration by this office, and has been the subject of a conference of Attorney General William L. Boatright, Deputy Attorney General Charles Roach, Assistant Attorney General Ralph Carr, and the writer. The views expressed herein are the conclusions reached by that conference.

The Act of Congress above mentioned provides for the apportionment to the states of certain land, the proceeds from the sale of which shall be used by the states for the establishment of colleges for the benefit of agriculture and mechanic arts. Section 4 of said act, as amended in 1883 (22 U. S. Stat. at large 484) provides, *inter alia*:

> "That all moneys derived from the sale of lands aforesaid by the states to which the lands are apportioned, and from the sales of land-script hereinbefore provided for shall be invested in stock of the United States or of the states, or some other safe stocks; or the same may be invested by the states having no state stock in any other manner after the legislatures of such states shall have assented thereto, and engaged that such funds shall yield not less than five per centum upon the amount so invested and that the principal thereof shall forever remain unimpaired, * * *."

The provisions of this act were accepted by the State of Colorado by its act of January 27, 1879 (S. L. 1879, p. 174). Further legislation by the state on this subject was enacted in 1887, 1915 and 1919. The act of 1887 is not particularly pertinent hereto

but Section 2 of the Act of 1915 (S. L. 1915, p. 18), provides, in part, as follows:

> "The State Board of Agriculture shall have control of the funds derived from the sale of lands donated by the said Act of Congress of 1862, and shall invest the same so that it shall yield not less than five per centum per annum, net, and shall disburse the income therefrom for the use and benefit of the State Agricultural College.
>
> Said funds derived from the sale of lands donated by said act of 1862, may be invested in municipal or school district bonds, or in farm loans, in the discretion of said State Board of Agriculture, * * *.
>
> The legislature of the State of Colorado engages that such funds shall yield not less than five per centum per annum, net, upon the amount of such funds available, for investment, that the principal thereof shall forever remain unimpaired, and that the income thereof shall be applied without diminution to the uses and purpuoses prescribed in said Act of Congress."

The Act of 1919 provides that (S. L. 1919, p. 111):

> "The State Board of Agriculture, on or before the 15th day of December, immediately preceding the convening of the general assembly, shall make a report to the governor showing the condition of said fund, the investment thereof, the security taken therefor, and the amount of income derived therefrom, and such report shall be by the governor submitted to the general assembly, and if such reports show that said fund has not earned five per centum per annum, an amount sufficient to cover such deficiency shall be and is hereby appropriated, as of first class, to be used for the purposes contemplated and prescribed by the said Act of Congress of 1862; and the state treasurer is hereby directed to transfer the amount so appropriated from the general fund of the state to the land income fund of the State Agricultural College."

The specific question presented is whether or not under the statutory provisions quoted above the State Board of Agriculture has the right to invest funds received under the aforesaid Congressional Act in bonds yielding less than five per cent per annum. You state in your letter that the "Board now finds that it is unable to buy Colorado securities that net five per cent, which meet the general requirements of safety laid down by the National and Federal Acts and must either not invest the fund,

thereby calling upon the state for the entire five per cent interest therefrom, or must invest the funds in such securities as meet the requirements at the highest interest rate obtainable and then call upon the state to make up the deficiency as provided by law."

In a letter to this office from the secretary of the State Board of Agriculture, a copy of which is enclosed with yours, it is stated that the board has presumed that it has the right to invest in securities which meet the requirements of the general assembly, even though they do not return five per cent net interest.

I may say at the outset that the position taken by the board has much to support it from a practical standpoint, as the loss to the state is manifestly less if the funds are invested in securities which come as near five per cent as possible instead of being left idle when five per cent securities cannot be obtained, and it may be possible that the statutes are susceptible of the interpretation placed thereon by your board. This is particularly true in view of the following language found in the first paragraph of Section 5 of the Act of 1862 (12 U. S. Stat. at Large, 504):

> "If any portion of the fund invested as provided by the foregoing section, or any portion of the interest thereon, shall, *by any action or contingency* be diminished or lost, it shall be replaced by the state to which it belongs, so that the capital of the fund shall remain forever undiminished * * *."

Under the plain wording of this provision, interest lost by any action or contingency shall be replaced. Clearly, interest lost by an investment in a security netting less than five per cent would be covered by the words "by any action." However, it is extremely doubtful whether or not the state took advantage of this provision in the Federal Act, for Section 2 of the 1915 act, which is quoted above, directly charges that the board "shall invest the same, so that it shall yield not less than five per cent per annum net."

This provision, which was in no way amended by the 1919 act, appears clearly on its face to be mandatory, rather than directory, and unless it was changed by the subsequent provisions of the 1915 and 1919 acts whereby the legislature engages to appropriate amounts sufficient to cover deficiencies, it must be treated as a direct mandate to your board to invest these funds so that they shall yield not less than five per cent.

In view of the fact that there is no provision in the Colorado statutes which goes as far as the provisions in the federal statutes regulating the investment of the fund, we feel that it is doubtful as to whether or not your board can, under any circumstances, invest in securities yielding less than five per cent.

Surely your board should not invest in securities yielding

less than five per cent until it has exhausted every possible method of obtaining securities which yield the interest required. It is to be noted that the 1915 act authorizes investments "in municipal or school district bonds, or in farm loans." We are of the opinion that the board should not invest in securities of any type provided for, yielding less than five per cent, unless it is positively unable to obtain securities of any other of the three classes which will net the five per cent. In other words, it is clear that the board should not invest in school district bonds, bearing less than five per cent interest, if it can obtain either municipal bonds or farm loans which will yield the required income. In the event that no security can be obtained in any one of the three classes which will net the desired five per cent, then only should an investment be considered which will yield less than that rate.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
JEAN S. BREITENSTEIN,
Assistant Attorney General.

180. MOTOR VEHICLES

To Chas. M. Armstrong, Aug. 23, 1927.

Fees provided for by H. B. 432 are in addition to fees now required by law.

Quarterly reductions granted by 1919 act should be applied to 1927 act.

All busses used exclusively for school purposes are exempt from the provisions of this act, but if any bus either owned or rented by the district is used for any other purpose than transportation of children to and from school, it would not be exempt.

181. SCHOOLS

To Mrs. R. F. Keenan, Aug. 24, 1927.

A school district may not pay tuition in an adjoining district for pupils which are non-resident of the paying district.

182. GAME AND FISH

To Ernest M. Oswalt, Aug. 24, 1927.

No hunting whatsoever may be done by any person upon a game preserve.

183. SCHOOLS

To L. R. Fenlason, Aug. 24, 1927.

A school board is neither required nor authorized to carry liability insurance.

184. **SCHOOLS**

To Mrs. Helen Reno Robbins, Aug. 25, 1927.

A member of a school board must be a legal resident of the district. Residence is a matter of intention, such intention to be gathered from all the circumstances and the acts of the party whose legal residence is in question.

185. **SCHOOLS**

To S. J. Sample, Aug. 26, 1927.

A school board may admit children who are less than six years of age but who are soon to arrive at school age. However, it is not compelled to admit them.

186. **COUNTIES**

To Ben L. Garman, Aug. 26, 1927.

Under House Bill No. 87 (26 G. A.) counties are subject to garnishment process.

187. **COUNTIES**

To Elizabeth Burke, Aug. 27, 1927.

Payment by county commissioners of premium on surety bonds given by banks to secure county deposits, is illegal.

188. **OLD AGE PENSIONS**

To W. E. Lawrence, Aug. 29, 1927.

Counties are not compelled to bring themselves within the provisions of the "Old Age Pension" law (H. B. 46). If any county determines to bring itself within the provisions of the act (by an affirmative vote of two-thirds of the members elected to the board of county commissioners) the county commissioners are bound by the terms of the act. After having operated under such system for at least one year, any county may abandon such system.

189. **SCHOOLS**

To Miss Laura N. Burchsted, Aug. 30, 1927.

The two-mile provision of the act of 1889 was impliedly repealed by the act of 1899.

190. **PUBLIC UTILITIES**

To Hon. Otto Bock, Aug. 30, 1927.

The computation of the tax provided for by H. B. No. 430 is not based upon the distance traveled on the public highway, but upon the number of miles the traffic is carried, whether on public

highways or not. If part of the distance is within city limits or on property outside of the city but owned by the city, such distance should be included in the computation.

191. PUBLIC UTILITIES

To John W. Flintham, Sept. 1, 1927.

The owner of a cottage camp located three blocks north of city limits on public highway would be required to secure a certificate of public convenience before he might run vehicles between his resort and the city.

192. STATE BOARD OF AGRICULTURE

The State Agricultural Board can not legally invest the funds of the State Agricultural College in Joint Stock Land Bank bonds, unless the provisions of Sec. 8058, C. L. 1921, can be complied with.

193. CONVICTS

To Cora V. Collett, Sept. 2, 1927.

As the residence of a family follows that of the husband and father, the county in which a convict resided at the time of his conviction is the proper county to support his wife and children.

194. CITIES AND TOWNS

To Clarence L. Magee, Sept. 2, 1927.

A town may legally impose a license fee on dogs and provide penalties for violations thereof.

195. OIL INSPECTION DEPARTMENT

To James Duce, Sept. 2, 1927.

Employees of Oil Inspector's department engaged in laboratory and chemists work are performing duties necessary and authorized by law and their compensation constitutes an expense of the Oil Inspector's office for which warrants should be issued.

196. MILITARY DEPARTMENT

The Governor as a member of the state military board may not sign a petition for an ordinance establishing an improvement district in the absence of express statutory authority for such an act.

To Hon. Wm. H. Adams, Sept. 7, 1927.

Dear Governor Adams:

You have handed me a petition addressed to the city council of Loveland, Colorado, and signed by a number of owners of property within a certain district of that town drawn under the

provisions of Subdivision C of Chapter 120 Revised Statutes of 1908 as amended by Session Laws of 1923, Chapter 180, which petition asks that proceedings be commenced for the purpose of causing the passage of the necessary ordinances to organize said described portions of said city of Loveland into an improvement district. In connection therewith you have asked my opinion as to whether you have the authority as governor of the state of Colorado or as a member of the State Military Board to sign such petition as an owner of the property within said proposed improvement district occupied by the state armory.

Article X, Section 4 of the Colorado State Constitution expressly exempts the property of the state from taxation. The expense connected with such a district would be paid with money raised by a special improvement tax. In the case of the *County Commissioners vs. The City of Colorado Springs*, 66 Colo. 111 at 116 after holding that this particular section of the constitution does not exempt counties from special assessments, the Supreme Court said:

> "The justice of the payment has been recognized by Colorado, who by reason of her sovereignty could not be compelled to pay assessments, yet voluntarily passed an act to do so. Session Laws 1917, 110."

The Session Laws referred to by the Supreme Court was passed by the general assembly in 1917 and provided for the payment of certain special assessments for local improvements in the City and County of Denver. It should be noted that this was an action of the general assembly.

Since the state is expressly exempted from the payment of taxes no official would have the authority to waive this exemption. If you were to sign the petition and the district were to be organized, the state would not be legally bound to pay for something which it had caused to be done.

The 1923 act, under the terms of which this improvement district is proposed to be organized, provides that "no improvement except sidewalks, water mains, sewers and sewage disposal works and their appurtenances shall be ordered under this act, unless a petition for the same is first presented, by the owners of a majority of the frontage directly abutting on that portion of the street to be improved * * *," Session Laws of 1923, page 623.

It may readily be seen from this that in case the frontage of the state were needed to be included within the required amount needed for a majority of the frontage then the state might without becoming in any manner liable itself impose this burden upon the owners of almost half of the frontage involved.

Section 201 Compiled Laws of 1921 provides that the quartermaster by and with the advice and approval of the Military Board

of the State of Colorado may rent, hire, purchase, take title to and hold in trust for the use of the State of Colorado such buildings, lands, tenements and their appurtenances as may be from time to time deemed necessary for use as armories for the National Guard. It also provides that all title shall be taken in the name of the governor for the use of the military department of the state and the Military Board is given full power and authority to sell or otherwise dispose of any or all property of the military department.

Section 202, which follows provides that the State Military Board may sell, trade or otherwise dispose of any real estate which has been acquired for military purposes.

There is nothing contained in either of said sections which would seem to authorize the governor, the quartermaster or the State Military Board to place a lien upon any property of that department in any manner. The payment of the special assessment mentioned in the 1917 act was an exercise of legislative powers and there is nothing in our law which would authorize the executive or any member of a board to subject such land as that in question to a lien for the payment of special improvement taxes. There is no express authority found for the subscription of such a petition by the executive nor is there any express denial to be found in the statutes. It is the opinion of this office, however, that the last named fact can have no bearing and that in order for you to sign such a petition, either in your capacity as governor, or as a member of the State Military Board, there must be express statutory authority for such an act.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

197. CITIES AND TOWNS

To S. R. McKelvey, Sept. 8, 1927.

Under Sec. 8987, C. L. 1921, the jurisdiction of a town would extend over the property occupied by the town waterworks, streams, trenches, pipes and drains necessary for construction, maintenance and operation, and in addition, over the stream or source from which the water is taken, for five miles above the point from which it is taken.

198. COUNTY OFFICERS

To J. C. Horn, Sept. 9, 1927.

The clerk of a county court in a county of the fourth class can be paid only from the fees and emoluments of the office.

199. COLLECTION AGENCIES

To L. M. Perkins, Sept. 10, 1927.

A person who has been engaged in the operation of a collection agency is required to file a bond with the secretary of state, although the business is being wound up and no further business is being solicited.

200. TAXATION

There is no provision in the statutes which gives the county treasurer or any other official the right to issue a receipt for the payment of taxes in full unless the principal and interest, together with any other charges legally laid down by law, have been paid. The county commissioners have no right to require the settlement of any tax claim for any amount less than the statutes provide.

To W. S. Kennedy, Sept. 10, 1927.

Dear Mr. Kennedy:

In your letter of September 8, you ask whether you have the authority, as county treasurer, to accept the principal amount of taxes due upon property in your county, issue receipt therefor showing payment in full, although no interest has been received. You state also that the Board of County Commissioners, or some member thereof, has ordered you orally to make settlement in a given case, and you ask whether this is sufficient authority for you to so act, or if you should require a written resolution.

Article 14, Section 8 of the Colorado Constitution says:

> "There shall be elected in each county, at the same time at which members of the general assembly are elected, commencing in the year 1904, one county clerk, who shall be ex-officio recorder of deeds and clerk of the board of county commissioners; one sheriff; one coroner; one treasurer, who shall be collector of taxes; * * *."

Section 8804, C. L. 1921, says:

> "The county treasurer of each county shall be, by virtue of his office, collector of taxes therein, and shall perform such duties in that regard as are prescribed by law."

And Chapter 159, Session Laws of 1923, says:

> "The treasurer on receiving the tax list and warrant, shall proceed to collect the tax therein levied and the list and warrants shall be his authority and justification against any illegality in the proceedings prior to receiving the list."

From this you may see that the county treasurer is a constitutional officer upon whom is placed the duty of collecting the taxes. The Board of County Commissioners have no jurisdiction or authority over the collection of taxes to the degree that our courts have held that the board has no right to hire help to assist him in the collection of taxes. Further than that, the treasurer and his bondsmen are held to a strict account for the performance of his duties as such collector. The only place where the board enters into the question of collecting or releasing a treasurer from the collection of any tax is found in Section 7448, C. L. 1921, which says:

> "All taxes of any kind, assessed in any county of this state, that shall have been delinquent for a period of six years, may be cancelled by the county commissioners in their respective counties; Provided, The county commissioners are satisfied that said taxes are uncollectible. The county treasurer shall keep a full and complete record of all taxes so canceled."

It is true that in some cases the amount of taxes due may be abated, but that is under the special procedure outlined in Section 7460 and requires the endorsement of the Colorado State Tax Commission before it may become effective.

It might also be urged that the commissioners have some jurisdiction to settle taxes after tax sale has been held and a certificate has been issued to the county. The answer here again is that such settlement may be made by the board, under the terms of Section 7422, C. L. 1921, after sale and while the certificate stands in the name of the county. You may readily see that the condition obtaining after sale is easily distinguished from the situation prior thereto, while the treasurer is engaged in an attempt to collect the tax.

There is no provision in the statute which gives you or any other official the right to issue a receipt for the payment of taxes in full, unless the principal and interest, together with any other charges legally laid down by law have been paid. It follows, therefore, that the county commissioners and no member of the board have any right, either orally or by resolution, to require the settlement of any tax claim for any amount less than the statutes provide. And you have no right, therefore, to accept the principal amount due in payment of the taxes when interest has also accrued.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
RALPH CARR,
Assistant Attorney General.

201. STATE ENGINEER

To M. C. Hinderlider, Sept. 10, 1927.

Notice of refusal to supply water to users who fail to provide headgates, measuring flumes or other necessary devices, as provided by Sec. 1727, C. L. 1921, should be served in the same manner as is required by law for the service of summons.

202. PARTITION FENCES

To Geo. M. Morrow, Sept. 12, 1927.

The remedy provided by C. L. Sec. 3157 for the recovery of costs of partition fences is exclusive and collection cannot be made by attachment or garnishment.

203. SCHOOLS

To Mrs. Lenore Johnson, Sept. 12, 1927.

Uninhabited territory may not be detached from one district and annexed to another unless in connection with the annexation of territory inhabited by legal electors qualified to sign the petition required by Sec. 8310.

A joint district can be annulled only by the voters of the district.

204. COUNTY COMMISSIONERS

To M. C. Hinderlider, Sept. 12, 1927.

A board of county commissioners is a continuing body in the sense that actions taken by one board are binding upon the following board, and a lease or grant of privilege for a reasonable time would be as binding upon the county as upon individuals in the absence of fraud.

205. SCHOOLS

To Dessie Dobler, Sept. 12, 1927.

In a school census there are included all children of school age in the district.

206. LUNATICS

To J. S. Labaree, Sept. 12, 1927.

The estate of a lunatic is liable for the costs incident to his commitment and is also liable for his maintenance at the Colorado State Hospital.

207. SCHOOLS

To McMullin and Sternberg, Sept. 12, 1927.

A supervisor of hygiene appointed by a school board need not be a trained nurse.

208. **TAXATION**

To G. E. Hendricks, Sept. 13, 1927.

In dealing with the products of manufacturers the statute requires that their property shall be taxed in the same manner as that of a merchandising concern. In other words the average shall be taken for such time as the manufacturer shall have been so engaged.

209. **TAXATION**

To R. B. McDermott, Sept. 14, 1927.

A resolution of the board of county commissioners designating two official county papers for legal publications could have no effect to compel the taxpayers of a county to pay for the publication of a delinquent tax list in more than one newspaper, under Ch. 161, S. L. 1923. There should be an express selection and definite notice to the county treasurer that a certain newspaper is the one selected.

210. **SCHOOLS**

To Irene Parker, Sept. 16, 1927.

The minimum salary law applies to all teachers in a county except part time and special subject teachers.

211. **SCHOOLS**

To School Board of Dist. No. 5, Kiowa County, Sept. 17, 1927.

The board of directors is the sole judge of the proper distribution of pupils where there is more than one school in the district.

212. **PUBLIC HEALTH**

To Dana E. Kepner, Sept. 17, 1927.

It is the duty of the state chemist to make chemical analyses of samples of water from town water supplies when requested by the authorities. Chap. 145, S. L. 1925, does not repeal the provisions of C. L. Sec. 1013.

213. **ANATOMICAL LAW**

To Edgar A. Bocock, Sept. 17, 1927.

The anatomical law does not require that a district attorney before securing the performance of an autopsy upon a dead human body make a request in writing upon the person holding the cadaver when he wishes an autopsy performed.

214. GAMES OF CHANCE

To Claude D. Walrod, Sept. 20, 1927.

Playing games of chance with chips, checks, notes or scrip which are understood by the parties to represent value and by virtue of which the owner can obtain value, whether they are collectible by law or not, is gambling.

215. TAXATION

To Frank R. Dunlavy, Sept. 20, 1927.

Tax sale must begin on or before the date fixed by statute unless the deeds issued by the treasurer assign some reason for the postponement. Sec. 3, Ch. 148, S. L. 1925, provides that the sale of lands for delinquent taxes shall commence on or before the second Monday of December of each year.

216. COUNTY COMMISSIONER

To Ralph Horton, Sept. 27, 1927.

Although a county commissioner sends his resignation to the governor, who accepts, nevertheless the commissioner may continue to act as a de facto officer until his successor is appointed and has qualified.

217. SCHOOLS

To Wilma Ahern, Sept. 27, 1927.

Where there are two or more school houses in a district the board of directors has the sole control of the manner of the distribution of the pupils to the several schools while keeping in view the best interests of the entire district.

Neither the pupils nor the parents may dictate the manner of such distribution of puplis.

218. STATE ENGINEER

To M. C. Hinderlider, Sept. 27, 1927.

Under Sec. 3434, R. S. 1908, it is necessary for water commissioners to keep an itemized account of time spent in the performance of duties.

219. SCHOOLS

To W. R. McKinstry, Sept. 27, 1927.

The treasurer of the school district and not the county treasurer is the legal custodian of funds derived from a school bond issue.

220. **TAXATION**

To W. E. Kennedy, Sept. 28, 1927.

The interest of a tenant in real property is not such as to give him a right to redeem from tax sale and thus defeat the issuance of a tax deed.

221. **SCHOOLS**

To Mrs. Martha Thorne, Sept. 30, 1927.

The mileage allowed county superintendents of schools by the act of 1927 is not an emolument and therefore not unconstitutional.

222. **DISTRICT ATTORNEY**

To James M. Noland, Oct. 4, 1927.

Under Sec. 7948, C. L. 1921, the county commissioners may in their discretion disallow any charge against the county for the fees or costs of district attorney for trial or examination of a case before a justice of the peace.

223. **INSURANCE**

To Jackson Cochrane, Oct. 5, 1927.

Under Sec. 2473, C. L. 1921, the commissioner, with the approval of the governor, may employ such additional help as may be required. Consequently it is necessary to obtain the consent of the governor before terminating the services of an employee so appointed in such department.

224. **INSURANCE**

To Jackson Cochrane, Oct. 5, 1927.

Insurance companies can act in this state only through authorized agents who are residents of the state. Consequently it would be unlawful for any one who is a resident of Wyoming to be licensed to represent an insurance company in Colorado.

225. **NOTARIES PUBLIC**

To Fred O. Pearce, Oct. 6, 1927.

Under Sec. 6023, C. L., every notary public must keep a record of his official acts. An official act is any act done by the officer in his official capacity under color and by virtue of his office.

226. **TAXATION**

To Thos. A. Nevens, Oct. 7, 1927.

The owner of real property sold for taxes, including personal property tax of his grantor, has a right of action against the county for the recovery of the personal property tax.

227. **SCHOOLS**

To Lura L. Hammond, Oct. 8, 1927.

A school board may require children of non-residents to pay tuition.

A school board may hold meetings on Sunday.

A county superintendent cannot remove a member of a school board but may fill a vacancy.

228. **TAXATION**

To G. E. Hendricks, Oct. 8, 1927.

A manufacturer is any person who purchases, receives or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, reducing, extracting or refining.

229. **ELECTIONS**

To Chas. M. Armstrong, Oct. 8, 1927.

The statute on voting by mail applies only to general and primary elections and not to special elections.

230. **SCHOOLS**

To Mrs. Estella Sowards, Oct. 10, 1927.

It is not legal for a school director to write insurance on school buildings in the district of which he is a director nor to sell any kind of supplies to the district.

231. **SCHOOLS**

To Mrs. Lida M. Oringdulph, Oct. 11, 1927.

A member of a school board may maintain a private school but no money for such purpose may be drawn from district funds.

232. **BANKS AND BANKING**

To Grant McFerson, Oct. 11, 1927.

Capital stock of industrial banks must be paid in full and in cash.

Articles of incorporation must strictly follow the Industrial Bank act.

Upon conversion of a loan or brokerage company into an industrial bank, the company must have the minimum capital of a new bank, plus assets to same amount. The bank commissioner is to use discretion in valuing the additional assets. The law does

not prevent the payment of a commission for organization expenses, provided the amount of capital stock is unimpaired.

The law does not preclude sale of bank stock at a price above par.

233. FIREMEN'S PENSION

To T. L. Witcher, Oct. 11, 1927.

A former employee of a paid fire department has no right to claim a pension under Sec. 9371, C. L. 1921, when his retirement was voluntary and not by reason of any mental or physical disability arising out of the performance of his duties or by reason of his service.

234. TAXATION

To Byron D. Brown, Oct. 11, 1927.

The owner of lots sold for taxes in 1921, may redeem from sale when certificate is held by county, without paying subsequent taxes, but he may not pay subsequent taxes without first redeeming from tax sale.

235. PUBLIC TRUSTEE

To John S. Boggs, Oct. 11, 1927.

A public trustee is not authorized by statute to act as agent for the holder of a trust deed and as such collect the amount secured by the trust deed. If he does so he is acting as an individual and not as an official.

236. ELECTIONS

To C. R. Furrow, Oct. 14, 1927.

Under the election laws loose leaf books are not precluded from use as registration books.

237. MOTOR VEHICLES

To James Pullar, Oct. 14, 1927.

A county clerk is not justified in refusing to issue a motor vehicle license on the ground that there are unpaid taxes upon the vehicle. Under Ch. 137, S. L. 1927, a county clerk is not required to search for tax liens upon motor vehicles in issuing certificates of title or permitting transfer thereof.

238. ARCHITECTS

To R. O. Perry, Oct. 14, 1927.

Only natural persons may take examinations and secure certificates as architects; no additional fee may be collected from

co-partnership when all members of firm are architects. Corporations and partnerships may not take examination.

239. STATE BOARD OF AGRICULTURE

To L. M. Taylor, Oct. 15, 1927.

Bonds of local improvement district, issued under Ch. 180, S. L. 1923, may be purchased by State Board of Agriculture in the investment of funds under Sec. 8058, C. L. 1921.

240. NON-SUPPORT LAW

To British Consulate, Oct. 18, 1927.

The Colorado statutes on non-support (Secs. 5566-5575 C. L.) only cover cases in which the wife and children as well as the husband are residents of this state at the time of the act of desertion.

241. STATE ENGINEER

To M. C. Hinderlider, Oct. 20, 1927.

Since the state engineer is held responsible for the proper administration of the waters of the state, his judgment in case of a conflict between inferior officers, must be regarded as supreme.

242. TAXATION

Stock in mutual ditch companies is exempt from taxation. Excess water rights are not exempt from taxation. Unused water rights which do not enhance the assessed valuation of any land are likewise not exempt from taxation.

To J. R. Seaman, Oct. 20, 1927.

Dear Sir:

We have your request for an opinion as to whether a certain petition for an abatement of taxes assessed against certificates of shares of stock of a ditch company should be granted, and in which letter you ask for an interpretation by this office of the effect of a recent opinion of the Supreme Court upon the right of county assessors to assess excess water rights of such irrigation companies.

We shall take up, first, the question of the merits of the petition in question and then discuss the matter of the assessment of such water rights.

The petition of H. W. Allen asks, first, for an abatement of taxes assessed for the years 1923 and 1924 and a portion of 1926, and, second, for a refund of the taxes for 1925 and the remaining portion of 1926. The board of county commissioners of Otero county to which the petition was addressed has submitted it to your commission, with a recommendation for allowance.

A copy of said petition is attached to your letter and it appears therefrom that it is based upon an assessment laid and a tax levied against certain shares of stock in a ditch company. The exact language of the important averments of the petition is as follows:

> "That included in the taxes of your petitioner for said years was an item for Fort Lyon Water Stock valued at $1,250.00 for each year, which assessment was made erroneously and unlawfully, and was and is totally void for the reason that the water evidenced by said certificates of stock was not used by your petitioner or any other person upon any land, and corporate stock is not subject to taxation according to the laws of the State of Colorado."

Since the assessment was against certificates of shares of stock in a ditch company it cannot be upheld under the doctrine laid down by the Supreme Court in the case of the *Board of County Commissioners of Montezuma County vs. Cortez Land and Securities Company*, 254 Pac. 996. In that opinion the Court said in part:

> "The essential facts are as follows: The Cortez Company, defendant in error, was a stockholder in the Montezuma Valley Irrigation Company, a mutual ditch company, and owned land under that company's ditches to which its water rights, held by virtue of its stock, were applicable. It purchased 251 other shares of stock in said ditch company, which, it is admitted, is of the value of $6,000. This stock was assessed for the year 1925, with the result above stated. The ditch company has issued 41,835 shares of stock, each of which entitles the holder to water for one acre. There are about 26,000 acres under cultivation under the ditch. The Cortez Company owns about 10,000 acres with stock to irrigate it. It cultivates but a small part of this land, and its surplus water inures to the benefit of other shareholders, but to no one else. Colo. Const. Art. 10, Sec. 3, reads:
>
> > 'Ditches, canals and flumes owned and used by * * * corporations, for irrigating land owned by such * * * corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes.'
>
> C. L. Sec. 7383, reads:
>
> > 'Provided, however, that corporate stock shall be deemed to represent the corporate

> property, and except in case of banking corporations, shall not be taxed. The taxpayer need not return such stock in his schedule.'
>
> (1) The defendant in error maintains that under this section of the constitution its stock cannot be taxed. We think the proposition is right. The ditches, canals, and flumes of the irrigation company are used for irrigating the land of its members and for no other purpose, and are therefore not taxable. *Certificates of shares of stock commonly called stock are but statements of the undivided interests of the company's property which belong to the holders of the certificates.* Said Section 7383 expresses this fact. The property of a corporation is assessed to the corporation and the corporation pays the tax. Thus the tax is paid on the interest of each shareholder. If, then, the property is exempt, the shareholder's interest is exempt.''

However, that portion of the petition which alleges that the assessment was void ''for the reason that the water evidenced by such certificates of stock was not used by your petitioner or any other person on any land'' is not in our opinion to be given any weight soever in considering petitioner's right to abatement or refund. The answer to this question is based solely and alone upon the reason that the petitioner is the owner of shares of stock in a ditch company and that said assessment seems to have been made only upon his certificates.

Taking up then your second proposition you say that this petition should not be granted for the reason that under the decision of the Supreme Court in the case of *Board v. Cortez Company, supra,* county assessors will in the future be prohibited from following the practice of other years of assessing excess water rights.

Your suggestion is undoubtedly based upon the last paragraph of the Supreme Court's opinion in the Montezuma case where it was said:

> ''(2) It is claimed that the defendant in error is not using this stock to irrigate its land, and therefore it should be taxed; but the conclusion does not follow. The Cortez company's unused water rights are used by other shareholders in the irrigation company, and so the ditches, canals, and flumes of the latter are still owned and used exclusively for irrigating land owned by its individual members.''

A careful analysis of the Supreme Court's decision proves its opinion to be sound in every respect. And in our opinion there

is no basis for the claim that this decision has in any manner weakened the authority of the taxing agencies of Colorado to assess excess water rights.

In the Montezuma case the water rights represented by the shares of stock sought to be taxed and which the Supreme Court said could not be assessed because they were shares of stock in a ditch company, did not constitute excess water rights. This is the point to be kept clearly in mind. All of the water belonging to the company was used by the shareholders in that company, although it did appear that certain shareholders failed to use the water to which they might have been entitled. None of the water went unused, nor did any outsider apply the same to beneficial use.

Under the decision of the Supreme Court in the case of *Murray v. The Board of County Commissioners of Montrose County*, 28 Colo. 427, a ditch company conveyed to consumers under its system the right to the perpetual use of water flowing through the ditch of the company. There was a supplemental agreement that when the company had disposed of a certain amount of water it would then convey for the benefit of the purchasers of water rights all of its canals, franchises, and property to a new company.

While the company had sold about one-half of the water rights under the estimated capacity of the ditch, it still retained title to the ditch and was offering to sell further and other water rights until the estimated capacity should be reached.

The company claimed that under our constitutional and statutory provisions its property was exempt from taxation. In dealing with the proposition the Supreme Court said:

> "The constitution provides: 'Ditches, canals and flumes, owned and used by individuals or corporations, for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed, so long as they shall be owned and used *exclusively* for such purpose.' Sec. 3, Art. 10.
>
> "In harmony with this provision, the legislature has provided: 'That all ditches used for the purpose of irrigation, and that only, where the water is not sold for the purpose of deriving a revenue therefrom, be and the same are hereby declared free from all taxation, whether for state, county or municipal purposes.' Sec. 2397, 1 Mills Ann. Stats.
>
> "In designating the property which shall be exempt from taxation, the statutes state: ' * * * Ditches, canals, and flumes, owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall

not be separately taxed, so long as they shall be owned and used *exclusively* for such purpose * * *.' Sec. 3766 Mills Ann. Stats.

"Exemptions from taxation are to be strictly construed, and cannot be enlarged by construction, for unless the privilege is limited to the very terms of the law under which it is claimed, its operation would be extended beyond what was intended. Cooley on Taxation, (2nd ed.) 205; 25 Enc. Law, (1st ed.) 157; *Vicksburg, etc. R. R. Co. v. Dennis*, 116 U. S., 665, 6 Sup. Ct. Rep. 625.

* * *

"* * * the title to the ditch is still vested in the corporation. It has reserved to itself the right to retain such title until the capacity of the ditch has been sold. It still has a large number of water rights which it is offering for sale. While it may be true that at some time in the future, the ditch will be owned exclusively by those using water therefrom for the purpose of irrigating lands which they own, or in which they are interested, that is not the condition at the present time. The evident purpose of the company in still retaining the title to the ditch is to derive a revenue from the further sale of water rights. That the purchaser of such rights may use the water in irrigating their lands only does not change the situation. The fact still remains that so long as the company is interested in the ditch with water rights remaining unsold, it is its purpose to make use of the ditch as a means through which to derive a profit from the sale of further water rights. The provision of the constitution upon which the ditch company relies was adopted for the sole benefit of those canals which are exclusively used for irrigating lands owned by those who own the canal in whole or in part—*Empire Canal Co. v. Rio Grande County*, 21 Colo., 244.

"The consumers appear to be making the use contemplated by the constitution, but the ditch company is not; hence, the ditch is not used exclusively for the purpose of irrigating lands belonging to the owners of the ditch. In *Empire Canal Co. case, supra*, the facts as deduced from the averments of the complaint are essentially different from those in the case at bar. It was there held that according to the statements in the complaint, the canal was used only for the purpose of irrigating lands belonging to the owners of such canal."

This ruling of our Supreme Court has never been reversed by judicial pronouncement nor modified by statutory enactment. Under the authority of that opinion the taxing agencies of the

State of Colorado are safe in proceeding in the assessment of water rights which may be classed as "excess."

The Allen petition presents a proposition which is not covered by either the Montezuma or the Montrose cases. The petition says: "That the water evidenced by said certificates of stock was not used by your petitioner or any other person upon any land."

When water is applied to agricultural land for a beneficial use, then the land's value is enhanced. Under the Colorado theory of the taxation of agricultural land the water, as such, is never taxed if it is used exclusively for irrigation. Land which is assessed for a certain sum because it has no water available would be assessed for a greater amount upon the application of water thereto although no tax is levied against the water.

It would seem, therefore, that there might be something more for the assessor to do in connection with the Allen matter, although the prayer of this petition is granted. Perhaps Allen owns land upon which the water represented by his certificates of shares of stock might have been used. If this is true and if the land was assessed as irrigated land upon the theory that this water was available therefor, then the county has received the full tax which our law provides may be collected. If, however, he owns land upon which this water is ordinarily used but which land, because of his failure to use the water has been assessed as dry land, then obviously it was the duty of the county assessor to have assessed the land the same as if it had been irrigated.

In the event it should develop, however, that Allen owned no land upon which this water might have been used and there was no other land under the ditch whose assessment was increased by reason of the ownership of the water rights by the company, then it would seem that the state and the county have lost that much in taxes because the water has not enhanced the value of any land.

It is true that if this condition were to continue then the company and its shareholders would undoubtedly forfeit their right to the use of such water. But until such time as such water is actually put to a beneficial use by others the company should not be permitted to claim title thereto, permit it to go to waste and still avoid the payment of taxes.

This water, then, could not claim protection from taxation under the constitutional and statutory provisions above quoted because the unused water is not used exclusively for irrigation purposes.

It is our opinion that such unused water would be in the same position as "excess" or unsold water rights and should be assessed to the company.

Our conclusions, therefore, are:

First, that the petition of Allen must be granted because the assessment was made against certificates of shares of stock in a

ditch company; second, that excess water rights are not exempt from taxation; and, third, that unused water rights which do not enhance the assessed valuation of any land likewise are not exempt from taxation.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
RALPH CARR,
Assistant Attorney General.

243. COUNTY COURTS

To C. M. Smith, Oct. 20, 1927.

C. L., Sec. 6592 is intended for the protection of poor persons and is not to be converted into an excuse for ordinary litigants to avoid the payment of the legal fees prescribed to be collected by our courts.

244. LUNATICS

To L. T. Morgan, Oct. 21, 1927.

There is a wide distinction between the obligations of the Colorado Board of Corrections in the case of insane persons and the duties of the commissioners of the State Homes for Mental Defectives in relation to those who may be sheltered in the homes at Ridge and Grand Junction. Therefore the same rules as to admission of patients cannot apply to all institutions.

245. SCHOOLS

To Elizabeth A. Baghott, Oct. 21, 1927.

The treasurer of a school district will be held liable for loss of school funds by reason of failure of bank in which he deposits such funds.

246. SCHOOLS

To Eads W. Lehman, October 24, 1927.

The county superintendent of schools has no right to take the funds of one district and transfer them to the credit of another district. Neither has the county treasurer such a right.

247. SCHOOLS

To Eads W. Lehman, Oct. 24, 1927.

School district cannot in any way, either directly or indirectly, pay the discount on teachers' warrants issued when no funds are on hand with which to pay them. Such discount paid

by the district may be recovered of the teacher in a civil action. 72 Colo. 596.

248. COUNTIES

To David Jacobs, Oct. 24, 1927.

H. B. 255, Ch. 83, S. L. 1927, provides that county treasurers shall deposit all county funds in one or more responsible banks located in the state of Colorado, and may take from such banks a good and sufficient bond. There is nothing in the statute which prescribes that the bond shall be a surety bond or a personal bond.

249. BANKS AND BANKING

To E. W. Pfeiffer, Oct. 25, 1927.

It is not proper for a clearing house association to pay surety companies for their premiums on surety bonds given for the purpose of protecting county deposits and thereafter to collect such premiums from the banks.

250. MOTOR VEHICLES

To Chas. M. Armstrong, Oct. 25, 1927.

The Secretary of State and the Public Utilities Commission should co-operate in working out the provisions of House Bills 430 and 432 relative to the licensing and taxation of motor vehicles. License fees should be collected by the Secretary of State, according to the table worked out by the attorney general.

251. COUNTY CLERK

To L. A. Munson, Oct. 26, 1927.

It is the duty of the county clerk and recorder to receive for record any instrument which may be offered to him for recording.

The legal sufficiency of the instrument offered for record should be left to the courts.

252. REAL ESTATE BROKERS

To C. M. Armstrong, Oct. 26, 1927.

The Secretary of State would not be justified in refusing a license to a person who does not intend to devote a definite portion of his time to such business, or to one who has no place of business other than his residence.

253. MILITARY DEPARTMENT

To Paul P. Newlon, Oct. 28, 1927.

Under ordinary conditions the state is required to pay National Guard officers under Section 3 of the National Guard Act, but under extraordinary conditions and in the event of an emergency payment should be made under Section 33.

254. SCHOOLS

To Frank M. Walker, Oct. 29, 1927.

A pupil who has graduated in the highest grade taught in the district may not demand permission to return and pursue a post graduate course at the cost of the district nor may he receive transportation at the cost of the district to a high school in an adjoining district. The school board prescribes the subjects to be taught.

255. SCHOOLS

To G. Gordon, Oct. 29, 1927.

Children of officers and soldiers stationed at Fort Logan have no status different from that of other children, and may be required to pay tuition when attending school in a district other than that of their residence.

256. COUNTIES

To Thos. S. Iles, Nov. 1, 1927.

Secs. 8853 and 8854, C. L. 1921, require that the moneys raised by a special levy for the payment of outstanding warrants must be kept in a special fund and may not be used for any other purpose.

County warrants for ordinary expenses should be paid in the order of their registration without reference to whether they are to pay past indebtedness or current expenses.

257. APPROPRIATIONS

To Paul Reddington and A. A. Edwards, Nov. 1, 1927.

Appropriations for the control and eradication of rodent pests should not be assigned to any class higher than the third.

258. SCHOOLS

To M. L. Long and M. L. Tremain, Nov. 2, 1927.

There is no statutory limitation on the number of special meetings that may be held to determine the location of a school house site.

The vote at a special meeting need not be taken by ballot.

The public may attend a meeting of a school board.

259. INDUSTRIAL COMMISSION

The 1927 coal strike was unlawful because of a failure to give the statutory notice.
The Industrial Commission may assume jurisdiction of the industrial dispute and proceed either under C. L. Sec. 4356 or by injunction.

To Industrial Commission, Nov. 4, 1927.

Gentlemen:

In your letter addressed to me under date of the 2nd inst., you direct attention to the fact that your commission recently sent me a copy of a notice received by you "some time ago signed by the I. W. W. strike committee and their secretary," together with a copy of the answer of your commission to said notice. You further state that your commission took the ground that said notice did not comply with the statutes of this state.

In your letter you ask my opinion upon the following questions:

1. Whether or not the notice referred to is a lawful notice;

2. Whether your commission "can assume jurisdiction in the present strike trouble in Colorado, under Section 4350, Compiled Laws of Colorado;"

3. If my answer to the question last above stated is in the negative, you desire to know whether or not your commission has "any authority under the industrial commission law to assume jurisdiction at this time."

4. You also ask to be advised if your commission "has authority, under Section 4357, to file information with the district attorney and ask for the arrest of any person violating the provisions of said section."

Your questions will be discussed in the order propounded.

Permit me to state at the outset that on the 25th of October your commission submitted to me a copy of the strike notice above referred to, together with a copy of the report of your commission dated October 15th, and that was the first official information this office ever had of the existence of said strike notice, or of your report in the premises. That report recites that under date of September 6, 1927, your commission received a letter "signed by the secretary of the so-called strike committee of the Aguilar conference of the Walsenburg branch of the I. W. W., enclosing a demand for increased wages and change in working conditions in all the coal mines in the state of Colorado," and stating that if such demands are not met by the coal operators a strike will be called. The report also sets forth that your commission held a meeting at Walsenburg and visited a number of the mines in the district, examined witnesses under oath regarding the Aguilar conference and secured testimony from men who took part in or knew of such conference, but that your commission "was unable to find a single delegate to the conference who was elected by

his fellow workers in a meeting assembled for that purpose. Many delegates were found who had volunteered to represent the mine in which they were employed, but in no instance had there been a meeting of mine employees held for the purpose of electing delegates to this conference." Your said report also recites that under date of September 17, a further letter was received by your commission "signed by the secretary of the so-called strike committee notifying the commission that the date for the strike had been extended to October 18, 1927." Said report cites the provisions of the statute of this state regarding notices of strikes or lockouts, and concludes "that the Aguilar conference failed to comply with the provisions of the industrial law and that no legal demand has been made for an increase in wages or change in working conditions by any of the men employed in the coal mines or by any committee duly elected and authorized by the employees to act for them in matters of this kind."

The letter or notice of September 6, 1927, purports to have been signed by a "strike committee," consisting of six persons, viz.:

"John Shepard,
Louis Rino,
John Vegsileos,
Leandro Gallegos,
Nemissio Edilla,
Walter Chatterbock."

The letter or notice of September 17, 1927, purports to have been signed by a "strike committee" consisting of the same six persons above named, whose signatures appear to have been attached by "A. K. Payne, secretary of the Strike committee."

I have positive information that John Shepard and Louis Rino were discharged from the service of the Colorado Fuel and Iron Company, September 5, 1927, one day prior to the date of the first strike notice above referred to; that John Vegsileos quit the service of the Colorado Fuel and Iron Company August 25, 1927; that Nemissio Edilla was discharged from the service of the Colorado Fuel and Iron Company August 27, 1927; that Leandro Gallegos and Walter Chatterbock were not in the employment of said company September 6, 1927, or for at least a considerable time prior thereto, and in short that neither said A. K. Payne nor any member of said strike committee was an employee of said company, or of the Victor American Fuel Company at the time either one of the so-called strike notices purports to have been signed. As to whether any member of this strike committee was in the employment of any other coal mining operator at the time of the execution of either of said strike notices, I am not positively informed.

Section 4353, C. L. 1921, provides that "employers and employees shall give to the industrial commission and the one to the other at least thirty days' prior written notice of an intended change affecting conditions of employment or with respect to wages or hours. * * * Such notice by an employer shall be signed by said employer or some officer of such employer, if a corporation, and notice by said employees shall be signed by said employees or members of a committee of said employees authorized for such purpose."

The above language is simple, plain and unambiguous. It requires a notice of an intended change affecting conditions of employment or with respect to wages or hours to be signed "by said employees" or members of a committee "of said employees authorized for such purpose." The notices above set forth embrace demands for changes affecting conditions of employment with respect to wages and hours, and under the statute they were required to be signed by employees or duly authorized members of a committee of such employees. The word "employees" as used in this statute clearly refers to and means "employees" of the particular employer upon whom the demand for a change of conditions of employment is made; that is to say, a notice signed by employees of one coal mining operator, only, would not be a valid notice, except as to such operator; or more concretely stated, a notice signed only by employees of the Victor American Fuel Company would be valid only as to that company and would not be a legal notice as applied to the Colorado Fuel and Iron Company, or any other employer. This statute does not mean that a group of employees in the service of one employer is authorized to serve notices of intended changes affecting conditions of employment in the service of other employers than their own. The statute means that the employees, or a committee thereof, of each employer must serve the designated notice upon their respective employers. It follows from the plain language of the statute that these so-called strike notices are absolutely insufficient and void as to all coal mining operators except such of them, if any, as were employing one or more members of the strike committee at the time such notices were signed. As above stated, I have positive information that no member of said strike committee was in the employment of either the Colorado Fuel and Iron Company, or the Victor American Fuel Company, either on September 6, or September 17, and, therefore, these strike notices are wholly ineffective and void, at least, as to these two employers, and likewise as to all other operators who were not employing any member of the strike committee at the time of the giving of either of said notices. The present strike, therefore, is unlawful as to all employees who have failed to give their employer the statutory notice signed by themselves or by a number of them, constituting a committee authorized to represent such employees.

Answering your second question, I beg to advise that, in my opinion, Section 4350, C. L. 1921, is a mere general enumeration of certain broad powers and duties of your commission with reference to labor conditions in general; that section has no reference to the powers or duties of your commission in the face of a particular existing controversy. It only means that your commission shall equip itself by a thorough and constant study of conditions affecting labor and the rights and interests of the public with relation thereto in general, to the end that your commission may be better equipped and of greater service in carrying out the other powers and duties devolved upon it by the industrial commission law.

I shall consider your third question at some length. You ask whether your commission has any authority, under the statutes, "to assume jurisdiction at this time." Section 4353, C. L. 1921, requires, as above noted, that employees shall give thirty days' notice to their employer of any change affecting conditions of employment with respect to wages or hours or otherwise. Section 4354, as amended by Section 2, Chapter 199, S. L. 1923, declares that it is unlawful for any employee to go on strike on account of any dispute prior to or during an investigation of such dispute by the Commission, or by a board, under the provisions of the industrial commission act; "provided, that nothing in this act shall * * * prohibit the suspension or discontinuance of any industry or the working of any persons therein which industry is not affected with a public interest." Section 4356 provides that the people of the state upon relation of your commission, as petitioner, may file in the District Court of the City and County of Denver, or of any county in which the place of employment of any part thereof is situated, a verified petition against employees, setting forth any violation, or threatened or attempted violation of any provision of said Section 4353, or Section 4354, and thereupon the court shall, without bond or notice, issue its mandatory writ enjoining the alleged violations or attempted or threatened violations of said sections, and requiring respondent employees to maintain all conditions in *statu quo* until after the dispute or controversy between employer and employees shall have been investigated and findings or awards made and entered by your commission. The same section authorizes any respondent to move the court to dissolve the mandatory writ upon five days' notice to your commission, but provides that such writ shall not be dissolved without proof of full compliance by the respondents with all provisions of the industrial commission act and all orders of your commission.

In the case of *People v. United Mine Workers of America*, 70 Colo. 269, the Supreme Court of this state held that the coal mining industry in this state is "affected with a public interest," and that therefore a strike in said industry prior to an investigation

by your commission of the controversy out of which the same arose could be enjoined by the courts. The question might be raised as to whether or not recent decisions of the Supreme Court of the United States impair the force or effect of the case above cited. And I shall therefore briefly review those decisions since I am of the opinion that, in reality, they strongly support the doctrine laid down by our own Supreme Court. In the case of *Wolff Packing Co. v. Court of Industrial Relations,* 262 U. S. 522; 27 A. L. R. 1280, it was held that those parts of a statute of the state of Kansas which gave an administrative board, called the Court of Industrial Relations, the right to fix the rate of wages that shall be paid in the meat packing industry were unconstitutional. The court said *arguendo* that the meat packing industry was not affected with a public interest in the sense or to the extent that it was competent for a state legislature to prescribe the rate of wages that should be paid employees of such industry. We pause here to note that the Kansas statute provided a system of compulsory arbitration of wage disputes, while our statutes provide only a system of voluntary arbitration thereof, with a prohibition of strikes or lockouts pending investigations of such disputes. In the latter case of *Wolff Packing Company v. Court of Industrial Relations,* 267 U. S. 522, the court held that the provisions of the Kansas statute authorizing the Court of Industrial Relations to fix hours of labor in the packing industry were also unconstitutional as to such industry. In the case of *Dorchy v. Kansas,* 264 U. S. 286, the court cited the Wolff Packing Company case, and stated that the compulsory arbitration provisions of the Kansas statute were invalid as applied to the coal mines of that state; but it appears that the Kansas statutes contain not only a system of compulsory arbitration but a prohibition against employees in certain industries, including mining, quitting their employment "for the purpose and with the intent to hinder, delay, limit or suspend the operation of" the industry. Another section of the act made it a felony for an officer of a labor union "willfully to use the power or influence incident to his office to induce an other person to violate any provision of the act;" and in the later case of *Dorchy v. Kansas,* 272 U. S. 306, the Supreme Court of the United States held specifically that "neither the common law nor the fourteenth amendment confers the absolute right to strike," and that, therefore, a labor union officer who called an unlawful strike could be subjected to punishment under the penal provisions of the Kansas statute above mentioned. We therefore conclude that the decisions of the highest court in this country uphold the doctrine laid down by our Supreme Court in the United Mine Workers case that there is no inherent or absolute right to strike and that strikes may be subjected to statutory regulation or temporary prohibition, and especially in industries that are affected in some degree with a public interest.

My conclusion therefore upon your third question is that your commission may assume jurisdiction at this time and proceed under said Section 4356, C. L. 1921, or possibly by injunction, independently of said section, but under the general doctrine laid down in the United Mine Workers case above cited; and at this point we note that at the time that case arose our industrial commission statute contained no such provisions as those embodied in Section 4356, expressly authorizing your commission to maintain suits to enjoin unlawful strikes.

In your fourth question you ask if your commission has authority under Section 4357 "to file information with the district attorney and ask for the arrest of any person violating the provisions of said section." Said section provides, *inter alia*, in substance, that any employee who goes on strike contrary to the provisions of the industrial commission act shall be guilty of a misdemeanor and fined not less than fifty dollars, or imprisoned in the county jail for not more than six months, and further that each and every day that the employee remains on strike contrary to the provisions of the statute shall constitute a separate offense. Said section further provides that any person who incites, encourages or aids in any manner any employee to go or to continue on strike contrary to the provisions of the statute shall be guilty of a misdemeanor and upon conviction punished by fine of not more than one thousand dollars or by imprisonment in the county jail for not more thna six months, or that such punishment may extend to both such fine and imprisonment in the discretion of the court. I have already held that this strike because of the insufficiency of the strike notice is clearly unlawful as to the employees of some, if not all, of the coal mining operators, and it follows that such employees are guilty of violation of said Section 4356, and likewise any person who incites, or encourages any of such employees to remain on strike is also guilty of a violation of said section. It is clearly within the province of your commission, or any member thereof who has personal knowledge of a violation of said Section 4357, to lay such information before the proper district attorney and to ask and insist upon the arrest of any person, or persons, violating said section.

I take this occasion to direct attention to still further legal remedies that may be resorted to in the present situation. Section 4162, C. L. 1921, which is commonly known as the anti-picketing statute, denounces as unlawful the act of any person or persons in loitering about or patrolling the streets, alleys, roads, highways, trails or places of business of any person, firm or corporation engaged in any lawful business, for the purpose of influencing or inducing others not to work for such person, firm or corporation. And Section 4166 declares that any person violating said Section 4162 shall be deemed guilty of a misdemeanor and subject to punishment by fine of not less than ten dollars nor more

than two hundred fifty dollars, or imprisonment in the county jail for not to exceed sixty days or by both such fine and imprisonment in the discretion of the court. The constitutionality of such statutes has repeatedly been upheld by courts of highest resort (see 35 A. L. R. 1200). Morever, Section 6645, C. L. 1921, provides that any one who stands by and aids, abets or assists in the perpetration of a crime shall be deemed an accessory and punished as a principal, and under the same section persons who advise or encourage the perpetration of a crime are likewise deemed accessories and made subject to punishment as principals. Therefore under these two statutes, all persons who engage in picketing or who advise or encourage picketing become violators of the law and subject to the penalties provided in Section 4166. Moreover, Section 6810 provides that if two or more persons shall conspire or co-operate to do an unlawful act they shall, if such unlawful act be a misdemeanor, be subject to a fine not exceeding one thousand dollars or imprisonment in the county jail not exceeding one year, or both such fine and imprisonment. These sections afford the civil authorities a very powerful weapon to deal with the picketing which appears to be so general in the case of the present strike.

Furthermore, the courts have often held that picketing may be enjoined by courts of equity (see *Thomas v. Indianapolis*, 145 N. E. 55; 35 A. L. R. 1194; *Hardle-Tynes Mfg. Co. v. Cruse, et al.*, 189 Ala. 66; *Amer. Foundries v. Tri-City Council*, 257 U. S. 184; *Truax v. Corrigan*, 257 U. S. 213.)

While it is true that the general rule is that injunctions will not issue to restrain violations of criminal laws, yet where a considerable emergency is found to exist the courts have often held that injunctions may be issued to restrain violations of criminal laws (see *In re Debs*, 158 U. S. 564; *People v. Tool*, 35 Colo. 225).

Finally, I shall add that if the numerous civil remedies above outlined are or shall prove to be insufficient to cope with the frequent violations of law arising out of the present industrial disturbance, the constitution and statutes of the state afford the chief executive ample power through the use of the military department to compel obedience to the laws of the state. In the exercise of the military power it would, in my opinion, be lawful for the military authorities under the sanction of the chief executive to place under arrest and to detain in military custody for the time being all persons found to be violating the laws of this state either by picketing or by acts of encouragement of picketing, or of other violation of the laws (see *In re Moyer*, 35 Colo. 159).

With no desire to usurp or trespass upon the duties or powers of any officer of this state, let it be clearly understood that this office stands ready, when legally called upon, to promptly invoke all lawful means to the end that the lives and property of our

citizens shall be fully protected, and all violators of the laws brought to speedy punishment.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

260. JUSTICE OF THE PEACE

To W. M. Hoffman, Nov. 7, 1927.

A justice of the peace has no statutory authority to grant a new trial or to re-open a case after rendering judgment. Relief must be sought in a higher court.

261. CIVIL SERVICE

To Civil Service Commission, Nov. 8, 1927.

Paragraph 3 of Rule VI of the Civil Service Commission is void. The appointing power is required by law to appoint always the person who has received the highest rating in a competitive examination.

262. MOTOR VEHICLES

To R. E. Burch, Nov. 10, 1927.

Under Ch. 135, S. L. 1927, one who uses his truck to haul grain for others for hire, is required to pay a fee in addition to the regular annual registration fee for his truck.

263. PUBLIC HEALTH

To W. E. Buck, Nov. 14, 1927.

Violation of quarantine regulations in a city should be prosecuted under municipal ordinance, not under state statutes.

264. COUNTY COURT

To Herman A. Bailey, Nov. 14, 1927.

Chapter 100, S. L. 1927, relating to county judges and clerks of county courts does not conflict with the constitutional provision relative to the increase of the salaries of public officers during their terms of office because it applies only to those thereafter taking office.

265. MILITARY DEPARTMENT

To Col. Paul P. Newlon, Nov. 16, 1927.

Under Ch. 9, S. L. 1919 (ex) dependents of enlisted men are entitled to receive allowances as provided in the act.

Under Sec. 33, Ch. 183, S. L. 1921, enlisted men are entitled to be paid one dollar additional per day for the first 20 days' service.

266. MOTOR VEHICLES

To R. E. Burch, Nov. 16, 1927.

Under H. B. 432, Ch. 135, S. L. 1927, the owners of motor trucks are required to pay an additional license fee, varying with the size of the truck.

267. SCHOOLS

To G. W. Todd, Nov. 18, 1927.

Only those can vote at school bond elections who have paid a school tax in the year next preceding such election.

268. SCHOOLS

To W. C. Wilson, Nov. 18, 1927.

The H. S. committee and not the component school districts, should provide transportation for high school pupils.

Nunc pro tunc entry may be made in the minutes of a school board.

269. SCHOOLS

To Albert M. Watson, Nov. 18, 1927.

High school committee may not conduct lotteries or other games of chance at high school carnival.

270. SCHOOLS

To Henry Gerber, Nov. 18, 1927.

Neither the county superintendent of schools, nor the county treasurer, nor any other officer, can lawfully transfer money from the general school fund to the special school fund of any school district. This applies also to transfers from special funds to general fund, and to transfers from general fund to county high school fund.

271. SCHOOLS

To Pelton & Chutkow, Nov. 21, 1927.

The minimum salary law makes no distinction between grade teachers and high school teachers, and applies to every public school teacher.

272. ADAMS STATE NORMAL SCHOOL

To H. C. Fairall, Nov. 27, 1927.

It would be lawful to anticipate the income arising out of the continuing mill levy of this school to a certain extent provided there are available funds wherewith to carry warrants in the amount desired payable out of the mill levy when the revenues therefrom are available to take up such warrants.

273. ELECTIONS.

To C. R. Furrow, Dec. 1, 1927.

An elector may not cast his vote outside of the state of Colorado.

An elector may change his party affiliation by making such a request at the first time and place provided for the registration of voters in such voter's county or precinct in any year in which a primary election is to be held.

274. SCHOOLS

To Dessie Dobler, December 1, 1927.

Under Ch. 156, S. L. 1927, the determination of the necessity of attendance at high school outside of county rests with the pupil. The high school committee of district of residence need not be consulted.

275. SECRETARY OF STATE

To E. L. Weitzel, Dec. 6, 1927.

C. L. Sec. 7867 does not exact any fee for the filing of a certificate of amendment to the articles of incorporation of a corporation organized not for profit.

276. ESTATES

To Earle Nelson, Dec. 6, 1927.

Claims against an estate may be filed any time within one year from the date of the granting of letters of administration, but if claims which might be preferred under Sec. 5331, C. L. 1921, are not filed within six months they lose their preference.

277. CITIES AND TOWNS

To Floyd Gipple, Dec. 6, 1927.

Under the provisions of Sec. 8988, C. L. 1921, it is necessary to submit to the taxpaying electors of a municipality the question of the sale of its light plant, the price to be paid and the terms of sale.

Consequently payment of commission could not be made unless the fact of paying it was stated as one of the terms of sale, approved by the electors.

278. MILITARY DEPARTMENT

To Hon. Wm. H. Adams, Dec. 7, 1927.

Insurrection bonds, series of 1904, cannot lawfully be issued to pay expenses of the National Guard in suppressing an insurrection in 1927.

279. INITIATIVE AND REFERENDUM

To W. B. Mooney, Dec. 7, 1927.

School teachers as a class are not included nor intended to be included within the prohibition contained in Sec. 32, C. L. 1921 (referring to circulation of initiative and referendum petitions) unless they are connected in the capacity of teachers with a state institution.

280. PUBLIC TRUSTEE

To Elizabeth Burke, Dec. 8, 1927.

In selling property under a deed of trust a public trustee cannot accept a less amount than that bid even though the bid was made under a misapprehension of the facts.

281. MOTOR VEHICLES

To Vera Rosebrough, Dec. 8, 1927.

Trucks operated by milk companies come within the provisions of Ch. 135, S. L. 1927.

282. MOTOR VEHICLES

To Hon. David Elliot, Dec. 9, 1927.

The General Assembly has the undoubted power to exempt certain persons or classes of persons such as farmers from the payment of certain motor vehicle license fees.

283. CORPORATIONS

To McAllister, Humphrey & Pew, Dec. 13, 1927.

The filing of a collection agency bond in compliance with provisions of Chap. 77, S. L. 1927, does not obviate the necessity of foreign corporation complying with corporation law.

284. SCHOOLS

To J. A. Carruthers, Dec. 13, 1927.

The increase of mileage allowed to county superintendents of schools under Ch. 154, S. L. 1927, is probably not an increase of emolument, prohibited by Art. V, Sec. 30, Constitution, and is, therefore, available to those in office at the time of passage of act.

It is possible that a doubt is cast upon the correctness of this opinion by the case of *Leckenby v. Post,* 65 Colo. 443, which, however, is not considered exactly in point.

285. BANKS AND BANKING

To Hon. Grant McFerson, Dec. 16, 1927.

The fees for examination of industrial banks are governed by Section 64 of the Banking Act of 1913 rather than by Section 8 of the banking act of 1927.

286. **COUNTIES**

To Clarence M. Smith, Dec. 16, 1927.

C. L. Section 3740, relative to the licensing and operation of theaters and other places of amusement on Sunday, is probably still in effect.

287. **JUSTICE OF THE PEACE**

To J. D. Wehrle, Dec. 21, 1927.

Right of a justice of the peace to continue in office depends upon whether he has lost his residence by moving family out of precinct.

288. **CORONER**

To Frank Tafoya, Dec. 21, 1927.

There is no provision of our statutes which precludes any county officer, other than county commissioner, from writing insurance or bonds where the premium is to be paid by the county.

289. **BANKS AND BANKING**

To Grant McFerson, Dec. 16, 1927.

Fees for examinations of industrial banks are still governed by Sec. 64 of the Banking Act of 1913.

290. **SCHOOLS**

To Inez Johnson Lewis, Jan. 5, 1928.

The amount of mileage which a county superintendent of schools is entitled to is governed by Ch. 154, S. L. 1927.

291. **PHYSICIANS AND SURGEONS**

To Maurice H. Rees, Jan. 9, 1928.

Physicians and surgeons on the staffs of the Colorado General and the psychopathic hospitals are liable to suits for malpractice the same as others engaged in the practice of medicine and surgery.

292. **PENITENTIARY**

To Warden F. E. Crawford, Jan. 10, 1928.

The warden of the state penitentiary has no power to make a convict serve his maximum sentence for infraction of the rules. Neither has the warden power to restore the minimum sentence to a convict who has been placed on the maximum sentence.

293. CORPORATIONS

To Messrs. Smith & Brock, Jan. 10, 1928.

Taxation of shares.

1. Sec. 2248, C. L. 1921, prescribing that for purposes of taxation shares of a corporation having no par value shall be taken to be of the par value of one dollar each, applies only to domestic corporations, not to foreign corporations.

2. In paying the fees required by Sec. 2305 and Sec. 7273, a foreign corporation cannot deduct from the value of its property located in this state, mortgages or other incumbrances on that property.

294. TAXATION

To G. C. Huffnagle, Jan. 10, 1928.

A county has no right to levy and assess taxes upon land purchased from the United States on which final certificate has not yet issued.

295. COUNTY JAILS

To George E. Herman, Jan. 11, 1928.

Under the law it is the duty of the sheriff of a county to feed all prisoners kept in confinement by him with good and sufficient food, and the county commissioners are required to pay all expenses connected therewith.

The county commissioners would not have the right to cut the allowance for feeding prisoners to an amount for which the sheriff could not furnish proper food.

296. BANKS AND BANKING

To J. R. Seaman, Tax Commissioner, Jan. 13, 1928.

Taxation.

County assessors should deduct the tax on real estate belonging to banks from the total value of the assets. The tax on the real estate is then paid by the bank, and the remaining tax is a levy against the individual shareholders while the bank is made the agency for the collection of such tax.

Real estate not located in Colorado may not be deducted.

Sec. 5219, R. S., U. S., and Secs. 7450-51-52, C. L. Colo. 1921, do not permit the exemption of real estate from taxation.

297. CITIES AND TOWNS

To Charles Dailey, Jan. 14, 1928.

Under Sec. 9172, C. L. 1921, franchises in cities and towns can be granted or renewed only by ordinance regularly passed by the

council. No vote of the taxpayers is required unless the ordinances are referred under the provisions of C. L., Sec. 39.

Sec. 2925 gives the Public Utilities Commission power to govern and regulate all rates, charges and tariffs of every public utility in the state, but probably can only change rates within the limits prescribed by the franchise.

298. BOARD OF DENTAL EXAMINERS

To Wm. H. Flint, D.D.S., Jan. 18, 1928.

There are two well recognized rules which the Board of Dental Examiners must comply with to escape liability. First, the board must act in good faith and without corrupt or malicious motives. It was said by the Supreme Court of Colorado in the case of *Speyer v. School District,* 261 Pac. 859, 860, that:

> "A person may act in his own right from any motive if his act is lawful, but a public officer must act without malice or at least must in good faith pursue a right purpose."

In the second place, your board must act within its jurisdiction in revoking the license, that is, it must comply with the statutory requirements relative to notice and hearing and then revoke a license only for a cause mentioned in the statutes which is sustained by evidence given at the hearing. Acts of public officers in excess of their jurisdiction may render such officers liable for damages resulting from such action. The question of whether or not an act of the board in revoking a license is within its jurisdiction depends entirely upon each individual case.

299. BUILDING AND LOAN DEPARTMENT

To Byron L. Miller, Jan. 18, 1928.

Sec. 2795, C. L. 1921, provides that all notes received by a building and loan association for the loan of its assets to its members "shall be in form non-negotiable." This provision would not prevent the assignment of these non-negotiable notes in case of a merger of two or more building and loan associations. 8 C. J. 56 and authorities.

300. TAX SALE

To A. H. Filkins, Jan. 19, 1928.

The purchaser of real estate at tax sale where tax on personal property of owner of real estate is included in amount paid, has no recourse against county, for the reason that Sec. 7402, C. L. 1921, which is mandatory, commands the county treasurer to sell at tax sale all real estate the taxes on which have become delinquent.

301. MOTOR VEHICLE

To C. M. Armstrong, Jan. 24, 1928.

Since hotel busses are used as a necessary incident to the business of furnishing hotel service to patrons, and no charge is made for the transportation of patrons, such busses are not included within the terms of Ch. 135, S. L. 1927.

302. MOFFAT TUNNEL

To John T. Joyce, Jan. 25, 1928.

The Moffat Tunnel is not subject to the jurisdiction of the commissioner of mines.

303. TAX SALE

To Otto Brandes, Jan. 31, 1928.

The owner of property sold for taxes can redeem only by paying the amount for which sold, together with all subsequent taxes assessed and endorsed upon the tax certificate. Sec. 7409, C. L. 1921; 24 Colo. App. 462; 65 Colo. 385.

304. COUNTY OFFICERS—EXPENSES

The county clerk is not entitled to traveling expenses incurred in going about the state on matters of interest and benefit to the county. (People v. White, 81 Pac. 315.)

The right of a county commissioner to reimbursement for traveling expenses incurred outside his own county seems to be authorized by Ch. 75, S. L. 1925.

County attorneys are appointive officers and if necessary for him to travel in the interests of the county, the board of county commissioners has the right to pay his traveling expenses.

Sheriff is entitled to traveling expenses.

County Assessor is entitled to traveling expenses.

All other county officials attending meetings of their several state associations outside of their own counties are not entitled to traveling expenses under the statutes.

To H. F. Kiesel, Feb. 2, 1928.

Dear Sir:

I have your letter of January 27 asking if a board of county commissioners has the right to allow the traveling expenses of the county clerk to a meeting of the state association of county clerks such as was held in Denver several weeks ago. You also ask if the board may allow such expenses for its own members, for the county attorney or any other county official except the assessor.

Under the decision of the Supreme Court in the case of *The People vs. White*, 81 Pac. 315, to which you have referred, it was decided that the clerk of Teller county was not entitled to traveling expenses incurred in going about the state on matters of interest and benefit to the county. The court based its ruling upon the proposition that there is no statutory authority for the allow-

ance of such traveling expenses. It follows therefore that the county commissioners have no authority to pay the expenses of the county clerk to attend the meeting which you mention.

The county commissioners do not come within the same classification as county clerks, however, because under the provisions of Ch. 75, Session Laws of 1925, they are allowed actual traveling expenses when engaged in business in behalf of the county. The right of a county commissioner to reimbursement for traveling expenses incurred outside his own county seems to be authorized by the express language of the statute which says:

> "County commissioners shall be allowed their actual traveling expenses when engaged in business in behalf of the county; Provided, that in no case shall expenses exceed the sum of fifteen cents per mile; and, Provided, further, That no expenses shall be paid for traveling outside of the state of Colorado; * * *."

County attorneys are not subject to the laws respecting either county clerks or the members of boards of county commissioners. The county attorney fills an appointive rather than an elective office. He is usually paid a salary which is fixed by the board. In the event it became necessary for the county attorney, in the interests of the county to travel, either within or without the county, then the board of county commissioners undoubtedly has the right to pay his actual traveling expenses while engaged in such work.

You also raise the question of the right of the commissioners to pay such traveling expenses for other county officials than the assessor. It is the opinion of this office that such officials fall within the same statutory prohibition which precludes the county commissioners from paying the expenses of county clerks. This should not be construed as meaning, however, that a sheriff shall not be entitled to payment under the law for traveling within or without the county. The point we wish to make is that the traveling expenses of all officers of the county except county commissioners, county attorneys and county assessors could not be paid under our statutes when such officials are attending meetings of their several state associations outside the borders of their own counties.

In our opinion it would not be legal for a county clerk to charge such expenses against the fees of the office because in the last analysis there would be no distinction between the payment out of the fees collected and the payment out of the general fund upon a warrant issued by the board of county commissioners.

In view of the good which is accomplished by these annual sessions, it is deplorable that the statutes do not provide for the payment of these expenses out of the general revenues of the counties. The White case settles the question for the time being,

however. It is going to work a hardship in many cases throughout the state this year. The solution of the problem depends upon the legislature and if every county officer who realizes the true situation will take it upon himself to see that this condition is changed, then it need continue no longer.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

RALPH L. CARR,
Assistant Attorney General.

305. MOTOR VEHICLES

To J. P. Russell, Feb. 8, 1928.

One who uses his truck upon the public highway to haul milk for his neighbors for hire, is not exempted from payment of the additional tax, even though the return for his service is small.

306. MOTOR VEHICLES

To L. C. Baker, Feb. 8, 1928.

One who uses his trucks to haul ice and coal to customers of company that pays him for his services is subject to payment of tax under Ch. 135, S. L. 1927.

307. MOTOR VEHICLE LAW

To Adair J. Hotchkiss, Feb. 8, 1928.

There is no definite rule as to the number of contracts a carrier must have before he is classed under H. B. 430, but whenever a man starts hauling for more than two, or three people at one time, he is close to the classification of motor vehicle carriers under H. B. 430.

308. JUROR'S FEES

To F. D. Guinn, Feb. 16, 1928.

When a juror is called for jury service, he attends before the court, even though he does not actually sit in the case, and should be paid the fees prescribed by law.

309. PRISONERS

To Charles J. Moynihan, Feb. 17, 1928.

Claims accruing in behalf of counties whose jails have been designated as places of temporary confinement for female reformatory inmates, should be presented by such counties to the Colorado Board of Control, approved and filed with the State Auditor for payment out of appropriation provided by Ch. 151, S. L. 1927.

310. MOTOR VEHICLE LAW

To C. M. Armstrong, Feb. 21, 1928.

A truck company which picks up and distributes for hire, the freight carried by a regularly licensed carrier, is subject to additional tax under H. B. 432.

311. PUBLIC UTILITIES COMMISSION

To W. E. Williams, Feb. 21, 1928.

The Public Utilities Commission has the authority, under Sec. 2940 (Par. 2), C. L. 1921, to order a railroad crossing closed even though it has been used as a street crossing for many years.

312. MOTOR VEHICLES

To Earl J. McCarty, Feb. 21, 1928.

Under Sub. (e), Sec. 1271, C. L. 1921, all motor vehicles traveling on the public highway shall carry a rear light between certain hours, and this includes highway maintainers.

313. FUNDS OF STATE

To H. C. Fairall, Feb. 21, 1928.

Transfer of balances.

1. The balance remaining in the defense and emergency fund created by Ch. 14, Ex. S. L. 1917, may be applied toward the payment of the current appropriation for the Soldiers' and Sailors' Home.

2. Neither the Saline land fund nor the funds established by Secs. 2694 and 2701, R. S. 1908, can be transferred to the general fund without additional legislation.

314. MOTOR VEHICLES

To Wayne S. Lutz, Feb. 21, 1928.

One who operates a truck under the additional fee required by H. B. 432, would be entitled to a refund if found to come within the provisions of H. B. 430.

315. ELECTIONS

To C. R. Furrow, Feb. 21, 1928.

Sec. 7727, C. L. 1921, provides that the voter may vote "in any voting precinct in the state." Therefore, it is not necessary that the voter prepare and cast his vote in a polling place, but may present himself before any official any place within the State of Colorado to vote.

316. CHANGE OF VENUE

To Edgar Reynolds, Feb. 24, 1928.

In civil actions before a justice of the peace where a change of venue is asked by one of the parties, the papers and documents should be transmitted to the nearest justice of the peace, regardless of county lines.

317. FEES AND MILEAGE

To Harry Fraser, Feb. 24, 1928.

Witnesses at coroner's inquest.

"For attending inquest over dead body before coroner, the same fees as above provided for attending before courts of record, to be paid out of the county treasury." Secs. 7905 and 7906, C. L. 1921.

318. COUNTY OFFICERS

To D. J. Davis, Feb. 24, 1928.

A county judge may *not* also hold the office of county attorney. Sec. 6014, C. L. 1921.

Under Sec. 5802, C. L. 1921, the county judge is authorized to appoint a clerk who shall receive the fees provided for by law, or if the judges prefer to do so, they may elect to perform the duties of clerk and receive the compensation and fees therefor, payable out of the fees of the county court in excess of the salary of the county judge. *Newitt v. Co. Commrs.*, 80 Colo. 109.

319. MEDICAL EXAMINERS

To State Board of Medical Examiners, March 2, 1928.

A chiropractor as such, is not authorized to sign a birth certificate because under Sec. 4558, C. L. 1921, a chiropractor has no right to practice obstetrics.

A chiropractor is a physician within the definition of that term (*People v. Max,* 70 Colo. 100, 114; *Prowitt v. Denver,* 11 C. A. 70, 71) and a physician is authorized by Sec. 976, C. L. 1921, to sign a death certificate.

320. SCHOOLS

To Katherine L. Craig, March 2, 1928.

The surplus funds in a school district treasury may not be used for building purposes unless the schools in the district are maintained for the period of ten months, and such surplus exists after the school term ends and all expenses incident to the operation of the schools are paid. Sec. 8289, C. L. 1921.

321. TAX DEEDS

To J. R. Seaman, Tax Commissioner, March 8, 1928.

While counties, cities, town or cities and counties may receive certificates of purchase after tax sales, under Ch. 152, S. L. 1927, only cities, towns or cities and counties may take tax deeds.

322. CITIES AND TOWNS

To C. E. Stephenson, March 9, 1928.

The right to distribute natural gas through the town of Littleton should be submitted to a vote of the electors, instead of being granted by franchise ordinance.

323. CORPORATION

To Charles M. Armstrong, March 13, 1928.

The secretary of state should not refund corporation license taxes which have been voluntarily paid without protest, even though the corporation had no corporate existence during the period for which the taxes were paid.

324. GARNISHMENTS

To H. A. LaMoure, March 13, 1928.

Under Sec. 4, Ch. 112, S. L. 1927, a state officer, in answering a garnishee summons, need not include as money due, the amount of any warrant or check drawn and signed prior to the service of the garnishee summons.

325. LAND BOARD

To State Land Commissioners, March 19, 1928.

Until land is surveyed by the U. S. Government and the plat thereof approved by the Commissioner of the Land Office of U. S., no title is vested in the State of Colorado by the enabling act. The state has no right to lease land granted under the enabling act until after a survey by the United States.

326. SCHOOLS

To P. B. Baum, March 20, 1928.

It is the duty of a union H. S. district to provide a school for the use of the district. (Sec. 8392, C. L. 1921.)

327. ELECTION

To C. E. Watlington, March 21, 1928.

Any registered voter who is eligible to vote at a general election and who has paid a school tax upon either real or personal property in the district in which he is voting during the year

previous to the election, is a legal voter within the contemplation of the law.

328. SCHOOLS

To E. J. Knight, March 21, 1928.

Under Sec. 8386, C. L. 1921, a high school committee shall have the power to employ or discharge teachers.

If a union H. S. committee sees fit to erect a shop building to be used in connection with the high school, it must submit the matter to a vote of the electors of the district.

329. APPROPRIATIONS

To E. R. Bliss, March 21, 1928.

Classification of appropriation for seed laboratory was held by the state auditing board to be in the third class. No funds to pay appropriation.

330. SCHOOLS

To W. F. Wilcox, March 21, 1928.

It would take an act of the legislature to allow a county high school district to dissolve or otherwise change its status.

331. FEES

To Wheeler S. Peck, March 22, 1928.

Fees collected by the clerk and recorder of Denver pursuant to Sec. 11, Ch. 136, S. L. 1925, and Secs. 3707 and 1548, C. L. 1921, payable to the state, should be remitted by such clerk directly, and not through the treasurer of the City and County of Denver.

332. SCHOOLS

To Mrs. B. E. Everett, March 23, 1928.

Any legal voter who is eligible to vote at a general election and who has paid a school tax on real or personal property in the district in which he is voting the year previous to the election, is a legal voter within the contemplation of the law.

333. MOTOR VEHICLE LAW

To Earle Bryant, March 24, 1928.

When a farm truck is used to haul coal to neighboring farmers, by the owner who buys the coal and sells it to third persons, it is not exempt under the provisions of Sec. 1, Ch. 135, S. L. 1927.

It is the opinion of the office, however, that such truck is exempted from the provisions of the additional license statute because it is not used for hire.

334. ELECTION

To M. B. Herrick, March 31, 1928.

An independent voter is not a member of either the Democratic or the Republican parties and should not and under the law is not permitted to claim the right of a member of either party to take part in the selection of that party's candidates for office.

Such voter has no power to vote at the direct primary unless he declares party affiliation.

335. FEES—COUNTY CLERK

To W. P. Dale, March 31, 1928.

A county clerk is bound to charge for the recording of reclamation contracts the same fees which are charged to any other individual or corporation for recording instruments of the same length and classification.

336. SOLDIERS' AND SAILORS' HOME

To Soldiers' and Sailors' Home—Greene, Commandant, April 4, 1928.

Under Sec. 700, C. L. 1921, which is a special act defining procedure by the officers of the home, necessary for the purchase of supplies by competitive bidding (passed in 1899), the commissioners of the Soldiers' and Sailors' Home have the power to advertise for bids in newspapers of their own selection.

In view of the fact that Sec. 5403, passed in 1891, is a general act providing for publication of legal notices, while Sec. 700 is a special act passed in 1899, the latter act supersedes the former.

337. SCHOOLS

To Mrs. Ruby S. Billington, April 7, 1928.

What is known as the county general fund is realized from a levy made by the county commissioners under what is commonly known as the minimum salary law, which law specifically provides that this fund shall be used for the payment of teachers' salaries only, therefore the only warrants a school district is authorized to draw against this fund are those for the payment of teachers' salaries.

Different county treasurers have different methods of designating the several funds, but there are, as a matter of fact, as a rule, three separate school funds, the county general fund heretofore mentioned, the old general fund received from the state and apportioned to the different counties in accordance with the school census. Fines and forfeitures due the school fund should also be carried in this fund, which may be drawn upon for general purposes. In addition to the two funds above mentioned there is usually a special fund in the hands of the county treasurer derived

from a levy certified by the school board. This fund may be drawn on for any legitimate school expense unless levied and collected for some specific purpose.

In the School Laws of 1927 are the following sections:
195—Fines payable to School Fund.
209—Special School Tax Levy.
304, 109, 110, 111—Old General Fund apportioned on school census.
294-301—Minimum Salary Law, and County General Fund.

338. SCHOOLS

To Mrs. Rose Bishop, April 9, 1928.

A district high school established by authority of Ch. 163, S. L. 1923, can be discontinued only upon action as formal as that required for its establishment.

339. SCHOOLS

To Frank L. Fair, April 9, 1928.

Qualifications of voters at bond election discussed. A number of examples considered.

340. PUBLIC TRUSTEE

To E. W. Davis, County Treasurer, April 9, 1928.

In case of error and the holder of the certificate of purchase bid an amount in excess of the amount which he would have bid but for the error, there is no way he can be relieved of the consequences, as he received the certificate for the bid, which was accepted; and the public trustee would have no power to set aside the sale. *Brockman v. DiGiacomo,* 76 Colo. 428; *Carlson v. Howes,* 69 Colo. 246.

341. COLORADO BOARD OF CORRECTIONS

To Chas. J. Moynihan, April 10, 1928.

It is the duty of the Colorado Board of Corrections to endeavor to carry out an act of the legislature even though the act be imperfect and contradictory (Ch. 151, S. L. 1927). Every enrolled bill is constitutional until a court of competent jurisdiction decrees otherwise. *People v. Leddy,* 53 Colo. 111.

342. TAX SALE CERTIFICATES

The holder of a tax sale certificate is entitled to a deed whether he was the purchaser at the tax sale, or he was the assignee of the county.

To Gilbert W. Walker, April 10, 1928.

Dear Sir:

Your letter of March 27, in which you present the following proposition, has been received:

You are the owner and holder of a certain tax sale certificate issued in 1920, upon which advertisement for a tax deed has been made after due request and notification; you have demanded the issuance of the tax deed and tendered all expenses in connection therewith; it appears further, however, that the county holds tax certificates for the years 1922 and 1926 and that the 1927 taxes have not yet been paid. The county treasurer refuses to issue a deed upon your 1920 certificate unless and until the amount due the county under the 1922 and 1926 sales, together with the taxes for 1927 have been paid. You contend that you are entitled to a tax deed without the payment of these amounts and say that Sec. 7426, C. L. 1921, in so far as it provides that a tax deed vests in the purchaser "all the right, title, interest and estate of the former owner in and to the land conveyed, and also all right, title, interest and claim of the state and county thereto" cannot affect the county's interests acquired under the subsequent tax sales.

Your right to a deed is probably determined by the provisions of Sec. 7422, C. L. 1921, and Ch. 152, Session Laws of 1927, which latter statute is an amendment of the provisions in the Compiled Laws.

Each provides that at any time after the expiration of three years from the date of the sale of any land for taxes a tax deed shall issue to the purchaser or lawful holder of the certificate upon compliance with certain other provisions of the statute and then says:

> "Whenever any lot or parcel of land, interest therein or improvement on land shall be bid in by or for the county, city, town, or city and county as the case may be, at any tax sale pursuant to the provisions of this act and a certificate of purchase shall be made to such county, city, town or city and county, therefor, the treasurer of such county, city, town, or city and county may sell, assign and deliver any such certificate to any person who shall desire to purchase the same upon payment to the treasurer of the amount for which said property was bid in by the county, city, town, or city and county, as the case may be, with interest and penalties accrued thereon from the date of sale, together with the sum of one dollar for making such assignment, also the taxes assessed thereon since the date of such sale, or in case of a county, city, town, or city and county for such sum as the board of county commissioners or other board authorized to perform the duties of a board of county commissioners at any regular or special meeting may decide and authorize by order duly entered in the recorded proceedings of such board * * *."

If a tax sale certificate is issued to a county under the provisions of the above act it is possible for a private individual to

acquire a tax deed to the property effected thereby, by first securing an assignment of the interest of the county therein. This can be done only by paying the amount of the taxes assessed against the land between the date of the issuance of the certificate and the assignment thereof by the county or by paying a compromise amount which is fixed by the board.

Nowhere in the statutes is there to be found any provision which requires the holder of the certificate to pay any taxes after he acquires the tax sale certificate. Sec. 7241, C. L. 1921, provides how any holder of a tax sale certificate "desiring to pay any subsequent taxes" may do so. This is clearly not mandatory, however. It is true also that the form of tax deed which is prescribed by Sec. 7425, C. L. 1921, contains a statement, after the recitals regarding the assignment of the certificate by the county, which says that the assignee has paid subsequent taxes on the property in a specified amount, but we do not think that this refers to any taxes except those assessed prior to the assignment. In the case of *Carnahan vs. Sieber Cattle Co.*, 34 Colo., 257, while dealing with the question of the things required to be shown in a tax deed, the court said at page 261:

> "The things of which the tax deed is made prima facie evidence relate to facts which occurred before or at the time of the sale, and not to acts which the cash purchaser is required to perform subsequent to the sale and as a further condition precedent to his right to a deed."

Of course, this was under another form of statute but the rule should hold in any case.

Several cases have been decided dealing with the necessity for the payment of subsequent taxes by a holder under an assignment, but the exact question which you raise was not determined in any of them. The language used in some of the opinions might easily be held to mean all taxes assessed prior to the issuance of the deed, but interpreted in the light of the statute it should probably be restricted to the narrower meaning. See *Empire Co. vs. Neikirk*, 23 App. 390; *Empire Co. vs. Howell*, 23 App. 265; *Barnett vs. Jaynes*, 26 Colo., 279; *Sherman vs. The Greeley Bldg. & Loan Assn.*, 66 Colo. 288.

If an individual is the purchaser and receives a tax sale certificate directly from the treasurer, he is not required to take into account any subsequent taxes which may be assessed before asking for a deed.

The assignee of a tax sale certificate from the county is the only person who is bound to pay subsequent taxes and the subsequent taxes which he pays are those which are assessed subsequent to the tax sale and prior to the date of the assignment.

Therefore, if you acquired your tax sale certificate direct from the treasurer in 1920 or by an assignment from an individual, as distinguished from the county itself, then you are not bound to pay the amount evidenced by the 1922 and 1926 tax sale certificates. Nor are you in duty bound to pay the amount of the 1927 taxes.

And if the 1920 tax sale certificate was assigned to you by the county, then you are not obliged to pay taxes assessed subsequent to the date of the assignment.

We agree with your contention that the issuance of a tax deed at this time upon the 1920 tax certificate does not affect the county's rights and interests under the tax certificates issued in 1922 and 1926 and the open assessment for 1927. The tax deed relates back to the date of the tax sale and affects only liens which are prior to that date and is, itself, subject to every valid lien arising after the date of the tax sale. The title under a tax deed has its inception in the issuance of the tax sale certificate and the delivery of a deed thereafter merely marks the final step in vesting the interest of the former owner of the property in the purchaser or assignee.

Pyles vs. Portland Gold Mining Co., 76 Colo. 598.

A subsequent tax sale, if valid, will wipe out the lien evidence by a former certificate and necessarily render that certificate valueless. The result is that the holder of a tax sale certificate who permits the land to be sold for taxes thereafter does so at his peril.

Every tax sale regular in all respects is the beginning of a new title which is paramount to titles originating in former sales.

Morris vs. Brauberger, 59 Colo. 164, 147 Pac. 674.
Henrylyn Irrigation Dist. vs. Patterson, 65 Colo. 385.
Bennett vs. Denver, 70 Colo. 77.
Henrie vs. Greenlees, 71 Colo. 528.
Denver vs. Bullock, 80 Colo. page 9.

But it is not for the county treasurer to hold that your prior lien has been extinguished by the later sales because that would amount to a determination that the subsequent tax sales are legal and valid. The treasurer is not required to usurp the functions of a court. It is our opinion that the treasurer should issue the tax deed as the statute requires and leave the grantee therein to his own devices in protecting whatever interest such deed may carry with it.

It is our opinion, therefore, that the holder of a tax sale certificate is entitled to a deed whether he was the purchaser at the tax sale, or if he was the assignee of the county.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

RALPH L. CARR,
Assistant Attorney General.

343. **CORPORATIONS**

To Chas. M. Armstrong, Secretary of State, April 11, 1928.

A corporation which voluntarily pays taxes and fees to the secretary of state, without protest, after expiration of its corporate existence, cannot thereafter recover such taxes and fees.

344. **SCHOOLS**

To Mrs. Nellie Fee, April 13, 1928.

There is no legal way for a district withdrawing from a union high school district after once having been incorporated therein.

345. **SCHOOLS**

To M. L. Youmans, April 13, 1928.

A school district may not expend its funds to erect buildings for rental to another district.

346. **INSURANCE**

To Jackson Cochrane, April 13, 1928.

The gift of a life insurance policy by an agent is clearly the giving or allowing of a rebate of an insurance premium, contrary to the provisions of Sec. 2528, C. L. 1921, for which criminal proceedings may be instituted.

347. **INSURANCE**

To Jackson Cochrane, April 13, 1928.

The statement of condition of insurance company required to be published under Sec. 2494, should be made by a company whose capital has been impaired, but restored, as of the date when the impairment has been made good.

348. **HIGHWAY DEPARTMENT**

To Charles M. Armstrong, April 14, 1928.

The state highway department, rather than the secretary of state, has authority to purchase automobiles for the department.

349. **SCHOOLS**

To James Marrs, April 14, 1928.

The payment under protest of taxes due a school district does not prevent the immediate use of the money so paid.

350. **ENGINEER**

To M. C. Hinderlider, April 14, 1928.

Water commissioners may accept outside employment when the same does not conflict with the requirements of their office.

351. **CITIES AND TOWNS**

To Town of Marble, April 17, 1928.

Under the statutes (Sec. 9122, C. L. 1921) it would be unlawful for any member of the town council or board of trustees to be appointed as town marshal with a salary.

352. **CITIES AND TOWNS**

To Town of Marble, April 17, 1928.

Under Sec. 8989, C. L. 1921, the city council and boards of trustees "shall have * * * power to levy and collect annually from each able-bodied male citizen of such city or town between the ages of twenty-one and sixty years, a poll tax or require a certain amount of labor in lieu thereof; provided such tax shall not exceed the sum of three dollars per capita."

353. **MOTOR VEHICLES**

To Chas. M. Armstrong, April 14, 1928.

The secretary of state is the head of the motor vehicle department and has the power to appoint such clerks as he deems necessary for the proper administration of the law. So long as he abides by the civil service rules and does not exceed the appropriation of the legislature, he may employ either full time or part time clerks, as he deems best.

354. **DANCE HALLS**

To Bd. of County Commrs., Weld County, April 19, 1928.

Under Ch. 147, S. L. 1927, there is no authority for the county commissioners to prohibit the holding of dances on Sunday, by issuing a license good on week days only, or to specify on what days of the week dances shall or shall not be conducted.

355. **ELECTIONS**

To A. L. Taylor, April 20, 1928.

There is nothing in the statutes (Ch. 98, S. L. 1927) which prohibits the nomination of the same candidate upon both the Democratic and Republican tickets.

356. **BUILDING AND LOAN ASSOCIATIONS**

To The Home B. & L. Assn., April 20, 1928.

In order to meet the requirements of Sec. 2792, C. L. 1921, the amount of loans by a building and loan association should be secured by a single mortgage or deed of trust.

357. COUNTY FUNDS

To R. J. A. Widmar, April 20, 1928.

Funds raised by boards of county commissioners under the provisions of Sec. 8690, C. L. 1921, may properly be used to pay for the preparation of articles to advertise the resources of a county.

358. MILITARY DEPARTMENT

To Hon. Harry Casaday, April 21, 1928.

If the title to the land was obtained by the state after the assessments became a lien, the lien is not extinguished by the acquisition of title by the state but the assessments are still due and payable, for the rule is that upon acquisition of land, against which there are certain liens, by a governmental body other than that holding the lien, there is no merger of the lien in the title so as to relieve such body from payment of the lien. See note in LRA, NS. 711; 26 R.C.L. 299, and *City of Santa Monica vs. Los Angeles,* 15 Cal. App. 710.

359. COUNTY OFFICERS

To O. P. Weston, April 21, 1928.

Assessor.

When an assessor acts in good faith in fixing the assessed valuation of a piece of property, the provisions of Sec. 7360, C. L. 1921 would have no bearing on his action.

360. SCHOOLS

To J. L. Short, April 23, 1928.

The board of directors has the sole control of school buildings and the power to prevent their use for any purpose other than school purposes.

361. ELECTIONS

To C. R. Furrow, April 24, 1928.

Qualifications of voters at primary.

Under Sec. 3, Ch. 98, S. L. 1927, every person to be able to vote at the primary election must be over the age of twenty-one years at the time of such election.

It is doubtful whether or not the provision of the primary act requiring every person to have the constitutional qualifications of a voter, requires a voter to have resided in the state one year before the primary election.

362. SCHOOLS

To Ruby S. Billington, April 24, 1928.

The statutes make no provision for the dissolution of consolidated district. This can be accomplished only by annexation to contiguous district.

363. SCHOOLS

To W. F. McMurdo, April 24, 1928.

The members of the faculty of the Western State College cannot be placed upon permanent tenure without favorable action of board of trustees.

364. FACTORY INSPECTOR

To M. H. Alexander, April 25, 1928.

The state factory inspector has no authority to close a building which he finds dangerous to the life and safety of those working therein; but by co-operating with the state industrial commission, he may cause a penalty action to be instituted against an employer who refuses to maintain proper working conditions.

365. ELECTIONS

To C. A. Stoddard, April 25, 1928.

The county clerk, rather than the county board, has the power to contract for the printing of election ballots.

366. TAXATION

There is no statutory provision for the keeping of taxes paid under protest in a separate fund and the same should be distributed among the several county funds and taxing agencies the same as if paid without protest.

To Mortimer Stone, April 30, 1928.

Dear Sir:

In your letter of the 27th inst. you state that your county treasurer has collected a certain sum of money from the Union Pacific Railroad Company as part of its general taxes for the year 1927 paid by said company, under protest, and that in the letter of protest the company has notified the treasurer not to disburse this money, and declares its intention of attempting to enforce the refund thereof. You point out that if the treasurer should disburse this money among the several school districts of the county, the city of Fort Collins, the state, and the county itself, it would be difficult for the treasurer to make refund in case the company should prevail. You ask the advice of this office as to the proper method for the treasurer to dispose of this remittance.

Section 338, C. L. 1921, provides that certain funds paid into the state treasury, under protest, shall be kept by that officer, as custodian, separate and apart from the other funds of his office. But I find no provision requiring general taxes paid to county treasurers, under protest, to be held intact by him.

Section 7447 requires county boards to return to the taxpayer taxes found to be erroneous or illegal, and Sec. 7445 requires the auditor of state to allow county treasurers to take credit for the amount of any state tax that may have been from time to time refunded to the taxpayer "as double or erroneous assessments." So far as I know it has always been the practice of counties to distribute taxes paid in, under protest, among the school districts, etc., in like manner as though the same had been paid without protest. This practice has sometimes resulted in the necessity of counties levying a special tax for the payment of judgments requiring refunds to be made. For instance, Mesa county has recently suffered a judgment upwards of $20,000, representing taxes alleged to have been excessive, and my information is that the county did not keep intact these taxes, though they were paid under protest and may now be required to make a special levy to satisfy this judgment if it becomes final. Secs. 7389, 7390, 7391 and 7395, C. L. 1921, require the county treasurers to make due remittance of taxes collected for the state and for state institutions, and I find no exception in behalf of taxes paid under protest. Sec. 8799 requires the county treasurer to apportion taxes collected among the several county funds, and no exception is made relative to taxes paid under protest. Sec. 8371 requires the county treasurer to keep school district taxes in separate funds, and here again no exception is made as to taxes that were paid under protest. Sec. 8302 requires the county treasurer to keep separate accounts of each school district and hold the funds of each district subject to legal warrants drawn in behalf of the district, and here again no mention of taxes paid under protest is made.

In fact I find no provision authorizing the county treasurer to treat taxes paid under protest any differently from taxes paid without protest.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

CHARLES ROACH,
Deputy Attorney General.

367. BOARD OF HEALTH

To Dr. S. R. McKelvey, April 30, 1928.

The state board of health can legally establish and enforce a rule requiring all licensed institutions to employ and keep em-

ployed at least one nurse who has the lawful title of trained, qualified, registered or licensed nurse. Secs. 4643-4651, relating to nursing, and Secs. 1053-1063, and Ch. 133, S. L. 1925, relating to hospitals.

368. SCHOOLS

To G. L. Cobb, May 1, 1928.

Secs. 5946 and 5947, R. S. 1908, although not specifically repealed, are obsolete; they were omitted from the compilation of 1921, and applied only to bonds issued under the provisions of the laws of the *territory* of Colorado.

369. COAL MINE INSPECTOR

To James Dalrymple, May 2, 1928.

There is no provision in the coal mining laws relative to the disposal of property of department. The only Colorado statute authorizing the disposal of state property is found at Secs. 426 and 427.

The sale of state property on the installment plan is illegal under Sec. 1, Art. XI, Constitution, which forbids the state to lend or pledge its credit in aid of any person for any purpose.

370. SCHOOLS

To C. E. Adams, May 2, 1928.

A school district can be withdrawn from county high school district only by establishing an accredited high school. Sec. 8421, C. L. 1921 (Sec. 245 School Laws of 1927).

371. COAL MINING

To Thomas Annear, May 4, 1928.

Under Sec. 103, Coal Mining Laws (Sec. 3551, C. L.) when a majority of the miners employed in a mine exercise their option to have a check weighman, his wages shall be paid by the miners working in such mine and all such miners are subject to deductions from their earnings to pay his wages.

372. MINE COMMISSIONER

To John T. Joyce, May 5, 1928.

The state commissioner of mines should not act as director of mining or other corporation.

373. TAXATION

To Clem W. Collins, May 11, 1928.

Real property left to the state bureau of child and animal protection under the will of Fred H. Forrester, is not subject to general property taxes after the date of the death of the testator.

374. COLORADO AGRICULTURAL COLLEGE

To Charles A. Lory, May 14, 1928.

The state board of agriculture may use state funds to secure fire, theft and collision insurance on state-owned autmobiles, but not liability or other automobile insurance; and may not expend state funds for insurance of any nature on privately-owned cars, although used in the service of the state.

375. SCHOOLS

To E. G. Baker, May 14, 1928.

Bonds issued by a district subsequently divided cannot be refunded by the voters of a portion of the original district.

376. COUNTY COMMISSIONERS

County commissioners are allowed mileage to and from meetings of county board, but are not allowed mileage for daily trips to and from the same meeting, where such meeting lasts for several successive days.

To J. P. Deatheredge, May 15, 1928.

Dear Sir:

In your letter of the 12th inst. you direct attention to Sec. 7934, C. L. 1921, as amended by Ch. 75, S. L. 1925, and ask my opinion as to whether or not a member of the board of county commissioners is entitled to traveling expenses where, during a continuous session of the board, such member goes home each evening and returns to the place of meeting the following morning. Otherwise stated, the question is whether in the case of a meeting of the board lasting for several successive days each member is entitled to mileage to the meeting at the commencement of its session and from the meeting at the conclusion of the session only, or whether, on the contrary, he is entitled to mileage to and from the place of meeting each successive day of the meeting.

I find but little authority upon this question. Sec. 2576, R. S. 1908, provided that county commissioners should be entitled to "10c per mile for the distance actually traveled in going to and returning from the place of meeting." That section is somewhat different in its language from the present provision which reads as follows:

> "County commissioners shall be allowed their actual traveling expenses when engaged in business in behalf of the county; provided that in no case shall expenses exceed the sum of 15c per mile" (S. L. 1925, page 211).

In construing said Sec. 2576 this office held in an opinion rendered the Public Examiner November 3, 1911, that said section allowed mileage only to the meeting and from the meeting, and

that where the meeting lasted several days mileage could not be collected by the members on account of trips home from the place of meeting in the interim between the commencement and the conclusion of the meeting. In that opinion this office said:

> "If the meeting extends from press of business over several days so that the board is in continuous session it is no less the same meeting; and the statute makes no provision for mileage back and forth after assembly and before adjournment of the same meeting."

In support of said opinion there are cited the following cases:

Howes vs. Abbott, 78 Cal. 270; 20 Pac. 572.
State vs. Norris, 111 N. C. 652; 16 S. E. 2.

The California case is particularly in point. It appears from that case that the statute of California provided that county supervisors shall receive "10c per mile in traveling to and from their respective residences to the county seat."

The Court said:

> "The law requires a supervisor to attend all regular and special sessions of the board, and to be present and assist the other members in transacting such business as lawfully comes before them. And while engaged in the performance of these duties his official residence is at the county seat. In going to a place of meeting at the beginning of a session, and in returning to his home at the end of it, he is evidently 'traveling on public business.' But, if during a session he makes daily visits to his home, such visits must be deemed to have been made for his own convenience, comfort, or economy, or to attend to his own private affairs, and not on public business."

I find no later authority directly in point but I think the former opinion of this office above referred to covers your question and my conclusion therefore is that in cases of meetings of your county board lasting over a period of several consecutive days members of the board are entitled to mileage to and from the meeting only and that they are not entitled to mileage on account of daily trips to their homes pending the conclusion of the meeting.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

CHARLES ROACH,
Deputy Attorney General.

377. SCHOOLS

To Anna C. Bell, May 16, 1928.

Instance where election of school director held legal, no authority was vested in the secretary to issue notice of the election of that particular officer.

378. GAME AND FISH

To E. G. Vanatta, May 17, 1928.

Inasmuch as an alien cannot lawfully hunt or carry firearms, and that the game and fish law makes provision only for licenses for hunting small game and fishing, one who has taken out his first citizenship papers cannot lawfully hunt or fish in Colorado until he shall have completed his citizenship.

379. ENGINEER

To M. C. Hinderlider, May 17, 1928.

Under Sec. 1, Ch. 134, S. L. 1923, if the resolution of the county commissioners requesting a second deputy is general in its terms and not limited to one or more irrigating seasons, then the resolution remains in force until rescinded by the board and need not be renewed each year.

When a water commissioner calls upon a deputy for service, he must have his action approved by both the irrigation division engineer and the state engineer.

380. TAXATION

To E. B. Morgan, May 18, 1928.

Land owned by El Jebel Shrine Association used for charitable and recreational purposes, is exempt from taxation. *Co. Commrs. vs. San Luis Valley Masonic Assn.*, 80 Colo. 69; *Horton v. Colo. Spgs. Masonic Bldg. Soc.*, 64 Colo. 529.

381. SCHOOLS

To Mrs. Martha Hurd, May 19, 1928.

School Bond Elections.

Holder of Tax Certificate.

The holder of a tax certificate, before a deed issues, who pays subsequent taxes on the property covered by the certificate, does not, solely by reason of the payment of such taxes become qualified to vote on the question of issuing bonds.

382. IRRIGATION

To M. C. Hinderlider, May 21, 1928.

The state engineer may exercise such constant and detailed supervision over division engineers and water commissioners as

may be necessary to see that the statutes relating to the distribution and conservation of water are enforced.

383. ELECTIONS

Registration in towns 2,000 to 5,000 population.
Words "preceding election" defined.

To Fred C. Pearce, May 23, 1928.

We have your favor of the 18th inst. enclosing copy of opinion rendered you July 24, 1924, by Hon. Wayne C. Williams, Attorney General, interpreting Secs. 2 and 17 of Chap. 67, S. L. 1917, governing the registration of electors in cities of from two to five thousand inhabitants, and more particularly advising you on your inquiry whether you are to take the poll books of the city election in April, 1923 (city of Brighton) or the poll lists of the November election, 1922 (Adams county), in making up the registration lists for the ensuing primary election. The opinion referred to concludes as follows:

> "I think, therefore, that the words 'last preceding general election' as used in Sec. 17, have reference, in this instance, to the city election of 1923 and therefore you should use the poll books of the city election in making up the registration lists for the coming primary."

We cannot concur in this opinion, and to explain our reasons for being unable to so concur we are compelled to go into the matter at considerable length.

The registration act, under consideration, that of 1917, is found in the Compiled Laws of 1921 as Secs. 7603 to 7635, inclusive. Section 7604 is Sec. 2 of said act, and Sec. 7619 is Sec. 17 thereof, referred to in said opinion.

The pertinent parts of Sec. 7604 are as follows:

> 7604. "The words and phrases of this act, unless the same be inconsistent with the context, shall be construed as follows:
>
> * * *
>
> "(g) The words 'preceding election' mean the last election, except a primary, held for candidates for office which was within the provisions of this act and irrespective of whether it was a similar election or not.
>
> "(h) The words 'General Election' mean any general state, county or city election for the election of officers, but not a primary."

Section 7619 reads as follows:

> "On June first preceding any general election the county clerk shall compare the above lists of voters who are shown thereby to have voted at the last preceding

general election with the original registration for such election, and strike from such original registration the names of all persons who failed to vote at such election, by drawing a red line through their names, and writing thereafter, in the column headed 'remarks' the words, 'failed to vote.' The registration lists as thus purged shall be the registration for the next ensuing primary election, with the names of such additional persons added thereto as shall, after the completion of said purging, have appeared personally before the county clerk for original registration or change of registration, not more than thirty nor less than three days before any primary, and complied with the requirements of law respecting registration before the registration committee, and said clerk shall register any qualified elector who shall so appear in person for registration."

These are the sections you refer to in your request for the opinion of July 24, 1924, and, assuming that these were the only sections considered in preparing the opinion referred to, we believe we can understand why such an opinion was rendered. But there are other sections of the act of 1917 which must be considered in arriving at a correct interpretation, and these we will call to your attention.

Sec. 28 of the act of 1917, Sec. 7630, C. L. 1921, reads as follows:

"In city elections all matters relating thereto and required to be done hereunder, shall be performed by the city officers as now provided by law; the registration committee for the city election shall consist of the board of election judges of each precinct, to be appointed by the city council as now provided by law. The said registration committee shall meet on the third Tuesday before each primary or election for the purpose of registering electors, and continue in session for at least three days and not more than five days. Changes in registration may be made by said registration committee or by the city clerk, in the same manner as herein provided, by the registration committee or the county clerk, at general elections. All registration books and supplies are to be furnished at the expense of the city and the city clerk is to be custodian of all registration books and to have the same powers and duties that are herein conferred upon the county clerk at general elections. All rules in regard to manner of registering of electors, purging of lists, and challenging of the registration herein shall be applicable to city elections."

This section, as we read it, absolutely divorces registration for city elections from registration for state elections, and negatives the idea that the county clerk has access to or any occasion to utilize the city registration books which are supplied at the expense of the city and of which the city clerk is specifically made the custodian. He is also given the same powers and duties as county clerks have in elections other than city elections.

Recurring to Sec. 7604, we find that it begins as follows:

> "The words and phrases of this act, *unless the same be inconsistent with the context,* shall be construed as follows:"

Then follows the definitions of the words "preceding election" and "general election" as heretofore quoted. This leaves us at liberty to disregard such definition of "general election" in interpreting its meaning as used in Sec. 7619 because such definition is inconsistent with the context of the act as contained in Sec. 7630.

We are, therefore, of the opinion that the words "last preceding general election" as used in Sec. 7619 mean the last general state election. The county clerk should therefore, in purging his registration list, use the poll books of the county and not those of the city.

There is an additional reason justifying this opinion in that Secs. 1 and 32 of the act, Secs. 7603 and 7634, C. L. 1921, specifically provide that it shall be applicable to election precincts included *wholly or in part* within the limits of cities with a greater population than 2,000 and not exceeding 5,000 inhabitants. It can readily be seen that where a precinct is only in part within the city, the city registration books would not contain the names of the electors residing in that part of the precinct lying without the limits of the city, neither would the poll list, hence they would be of no assistance to the county clerk in making up his registration for the state primary.

The writer knows of one city in this state with a population between 2,000 and 5,000, within the limits of which four county precincts corner and have their polling places, but each of which precincts extends several miles beyond the city limits. These precincts have been grouped by the county commissioners into one registration district in accordance with the provisions of Sec. 3 of the act of 1917, Sec. 7605, C. L. 1921. This is the city of Glenwood Springs, Garfield county. For the purpose of city elections the city is divided into three wards or voting precincts, the boundaries of which are fixed by ordinance without any regard to the boundaries of the four county precincts or either of them. The city has its own separate registration books over which the city clerk has custody, but which are not at any time in the

custody of the county clerk and in fact would be of no service to him in making up county registration.

We are unofficially advised that in the city of Brighton the city wards or voting precincts are co-extensive with the precincts of Adams county, and the county registration books and those of the city should contain the same names, but even so, under the provision of Sec. 7630 the city must have separate registration books, although it results in a seemingly unnecessary duplication, and these books are under the sole custody and control of the city clerk and are not accessible to the county clerk.

It is true that Sec. 22 of Ch. 127, S. L. 1911, Sec. 7656, C. L. 1921, provides that "the boundaries of election precincts in cities for city elections shall be co-extensive with those in such cities for county elections," but the Act of 1911 is by Sec. 1, Sec. 7636, C. L. 1921, referred to as governing registration in precincts included within the limits of cities with a greater population than five thousand, and Sec. 39 of said act, Sec. 7671, C. L. 1921, contains the following specific provision:

> "Sections 1 to 38 hereof, both inclusive, shall apply only to election precincts included within the limits of cities with a greater population than five thousand inhabitants."

But even without this specific provision, in case of conflicts between the two acts, the provision of the act of 1917 would prevail, it being the later act.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

A. L. BEARDSLEY,
Assistant Attorney General.

384. PUBLIC TRUSTEE

To Charles H. Smith, May 24, 1928.

Where note and deed of trust provides for an attorney's fee, the public trustee should collect such fee in the event of foreclosure.

385. AGRICULTURAL COLLEGE

Teachers' retirement plan as stated by President Lory, approved.

To Charles A. Lory, May 25, 1928.

My Dear Dr. Lory:

I have your favor of the 21st instant requesting a supplemental opinion of this office as to the legality of a co-operative plan set forth therein of providing retiring allowances and

annuities by and between the agricultural college and the faculty, members of the experiment station and the extension staff thereof.

You have outlined in the plan as follows:

"The board provide a system for retiring allowances and annuities in co-operation with the teacher.

"The opportunity be open to any worker with the rank of assistant professor or above, who has been in the employ of the institution five years or more.

"The opportunity to be open to men of equivalent rank, and salary, and service in the experiment station; and for the extension service as soon as legal difficulties can be met.

"The institution to contribute up to 5% of the salary, the worker an equal amount. On receipt of the salary voucher each month, a check for the amount included by the institution in his voucher and the amount contributed by the individual be made out to the secretary of the state board of agriculture, who shall send this to the Teachers' Insurance and Annuity Association in payment as a monthly installment on the retiring allowance or annuity; or if not on a monthly installment, then on a quarterly, or otherwise as may be agreed upon.

"The retiring allowance or annuity shall not exceed $1,800 a year. For those workers now in the employ of the institution who have been here five years or more and whose age limit prevents the purchase of annuity of $1,500 a year, on a 5% of salary contributory basis, provision is made for retirement at an annual salary of $1,200 for those whose salary on retirement ranges from $2,000 to $2,900, and $1,500 for those whose salary ranges from $3,000 or above.

"The age limit for retirement for workers now below 50 years of age shall be 65 years. Those now on the staff, 50 years or over, shall be retired at 68, with provision of continued employment on annual appointment to 67 for the former to 70 for the latter group, if desired by the board.

"The institution will retire all employees whether they take advantage of this retiring plan or not at the age limits set above, and assume no responsibility in providing retiring allowances for those now below 50, who do not elect the contributory plan."

It is my judgment, in view of the opinion set forth in my letter of May 24, 1926, that this plan comes within the scope thereof and I see no reason why it cannot legally be put into effect.

My only suggestion is that the worker's portion to be contributed monthly to such a fund be purely voluntary on his part and under an agreement with the college to this end.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
JOHN C. VIVIAN,
Special Assistant.

386. TAXATION

Value of fixtures removable by tenant should be deducted by assessor in fixing valuation of real estate for taxation.

To Colorado Tax Commission, May 25, 1928.

Gentlemen:

Your commission has submitted for my consideration the application of Flora A. Lee, for abatement of a portion of the taxes assessed against the building and improvements thereon, owned by her at Lamar, Colorado, and occupied by the Lamar National Bank. This petition appears to have been presented in due form to the board of county commissioners of Prowers county, and was allowed by resolution of that board adopted April 3, 1928, at a regular meeting at which the county assessor was afforded an opportunity to be present. Your commission, however, on April 10, 1928, disapproved the action of the county board.

The petition appears to have been allowed by the county board because of the fact that the petition represents that petitioner was assessed with the value of the entire building, whereas the lessee bank had attached certain fixtures to, and made certain improvements upon, the building and claimed to own such fixtures and improvements. These fixtures and improvements consisted of the following items, having the aggregate valuation of $3,580.00, viz.:

"Tiled Floor	$ 875
Vault	1,050
Plastering	245
Wiring	170
Changes in front	350
Plastered beams	670
Cornice	220."

The petition also recites that "Besides the above deduction the south wall has begun to settle and it will have to be plastered over in order to preserve it. For this repair a deduction of $140 is allowed, bringing the assessed valuation of the building

down to $12,570, instead of $16,290." The petitioner asked for "a rebate on $3,720 or $158.62." The lease held by the bank still has about nine years more to run; that lease was submitted to this office for inspection and it contains the following provisions:

> "It is understood and agreed by and between the parties hereto that the bank shall have the right and privilege of altering and changing the interior arrangements of said lower or ground floor in such manner and to such extent as shall render the said premises suitable and convenient for the carrying on of their said banking business; but such alterations and changes shall be made without material damage to the said building and the bank shall also have the right and privilege of constructing such a vault as they may deem necessary for their business, and may enlarge the same, should it become necessary to do so.
>
> "It is further mutually agreed that all fixtures, alterations, improvements, marble floor or floors, and property of every kind that may be added to or placed in or upon said premises by the bank or at its expense, shall be regarded as personal property, and the same shall at all times be and remain the sole and separate property of the bank and may be kept or removed by the bank and dealt with as its own, but upon the termination of this lease or upon vacating said premises, the bank shall place said interior of the demised premises in as good condition as when received, loss by fire or inevitable accident, and reasonable wear and tear excepted."

If the county assessor was not advised as to the terms of this lease when he made the assessment complained of and considered the above fixtures and improvements as being parts of the building and owned by the owner of the building, then his assessment was erroneous to the extent of the value of such fixtures and improvements, because they are removable under the express terms of the lease and remain the property of the bank and not the property of the owner of the fee.

The petition states that "The petitioner was assessed with the entire building" occupied by the bank, and I therefore assume that the assessor included these fixtures and improvements in his estimate of the value of the building and improvements thereon assessable to petitioner. If such is the case, petitioner is entitled to an abatement or rebate to the extent of the value of these fixtures and improvements.

Your commission, as I understand, was not advised of the terms of the lease to the bank at the time you denied the application for rebate.

With reference to the item of $140.00 claimed because "the south wall has begun to settle and it will have to be plastered over in order to preserve it," the case, in my opinion, is not so clear. If the county assessor took into consideration the condition of this wall when he arrived at his judgment as to the value of the building, then I do not see how this reduction of $140.00 in valuation should be entitled to be allowed. If, however, this was a matter that was not considered by the assessor, but represented a mistake or oversight on his part, then I think it would be proper to allow this reduction in valuation.

I find no Colorado decisions that bear upon this question of reductions in valuation on account of ownership of removable fixtures or improvements by occupying tenants, but the following authorities are in point:

State ex rel. Cramer v. Bodden (Wis.) 178 N. W. 242;
Le Paul v. Heywood (Minn.) 32 L.R.A. (N.S.) 368.

This case is followed by a note on the subject "Who is liable for taxes on improvements removable by tenant at end of term."

See also:

2 Cooley on Taxation (4th ed.), Sec. 559, 37 Cyc. 778.

My conclusion is that the items for fixtures and improvements that are removable by the terms of the lease should not have been considered by the assessor in fixing the valuation of this building, and that these items should be deducted from such valuation. But upon the showing made by this petition, I would not advise any reduction in the valuation on account of the condition of the south wall of the building.

I return herewith the petition above referred to.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
CHARLES ROACH,
Deputy Attorney General.

387. ELECTIONS

To Charles M. Armstrong, May 31, 1928.

Persons outside the state cannot vote by mail. Absent voters should designate their party affiliation in applying to the county clerk for a ballot.

388. ELECTIONS

To Blake Rogers, June 9, 1928.

Under Sec. 7811, C. L. 1921, the state central committee of any political party has exclusive power to pass upon and de-

termine controversies regarding the regularity of the organization in any county and the use of the party name.

Under Sec. 7681 the clerk of the board of county commissioners is required to file lists of election judges presented by officials of the county organization recognized by the state central committee.

389. SCHOOLS

To J. R. Bullard, June 9, 1928.

Sec. 8313, C. L. 1921 (Sec. 163, S. L. 1927), provides for a division of school funds in case of formation of new district, but makes no provision for a division of other personal property of the district.

390. FEES

To C. M. Armstrong, June 11, 1928.

A corporation organized under the act relative to ditch and reservoir companies is not required to pay any fee to your office for the filing of a certificate of the extension of its corporate existence.

391. OFFICERS

To E. R. Bliss, June 12, 1928.

One cannot be both a member of the state board of agriculture and a member of the general assembly.

392. SCHOOLS

To Mrs. J. G. Olesen, June 13, 1928.

Where transportation is necessary to accommodate pupils in a school district and the cost has not been provided for in the budget, the school board should call a special meeting of the electors (Sec. 8380, 1921; Sec. 152, School Law, 1927) and have ordered a tax sufficient to take care of the transportation (Sec. 8381, C. L. 1921).

393. PUBLIC OFFICERS

To Bradfield & Harbottle, June 13, 1928.

There is no statute which prohibits a person from holding a state office and a municipal office if the two offices are not incompatible.

394. CITIES AND TOWNS

To Frank B. Allen, June 13, 1928.

The office of town clerk and town treasurer cannot be held by the same person.

395. INSURANCE LAW

To Jackson Cochrane, June 18, 1928.

Under the Colorado retaliatory tax law, the insurance commissioner should collect from an Illinois company seeking to do business in Colorado an amount equal to $25 per month for as many months as will elapse between the date of the issuance of the license and the first day of July of the succeeding calendar year, because that is the amount which Illinois would collect from a Colorado company seeking to do business in Illinois.

396. SCHOOL OF MINES

T. C. Doolittle, June 19, 1928.

It would be legal for any person who practices engineering solely as an employee of the state, to assume charge of work of repairing a building belonging to a state institution.

While not required by statute, this work should be done on a contract basis—bids advertised for, work awarded to the lowest responsible bidder, who should furnish proper bond.

Such work should not be paid for out of maintenance fund of institution, but from special fund provided for the building to be repaired.

397. BANKS

The only remedy to recover assessments ordered by the board of directors of a state bank to restore impaired capital is an action at law under Sec. 2681, S. L. 1921.

To John H. Simpson, June 19, 1928.

Dear Sir:

Yours of the 15th inst. addressed to the state bank commissioner has been referred to me for consideration.

The question, as I understand it, is whether or not a state bank has a lien upon stock issued by it for assessments ordered by its board of directors pursuant to Section 2681, C. L. 1921, to make good an impairment of the capital of the bank, and if so whether such lien may be foreclosed by a suit in equity.

You have directed attention to Sec. 2695, C. L. 1921, which might be construed as establishing a lien in the cases above mentioned but you say that your county attorney has expressed the opinion that that section has been repealed by Ch. 81, S. L. 1927.

It is true, as you point out, that said chapter repeals certain existing statutes and "all other acts or parts of acts in conflict with this act." But the fact remains that said Chapter 81 is a general statute dealing with shares of corporate stock while Sec. 2695, C. L. 1921, is a special statute dealing only with the shares of capital stock of state banks. It is by no means certain

that this later general statute has the effect of repealing the earlier prior statute, viz.: Sec. 2695. I quote from 25 Ruling Case Law, page 927:

> "Hence, it is a canon of statutory construction that a later statute general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of the earlier statute."

See also:

Rice vs. Goodwin, 2 Colo. App. 267.
Schwenke vs. Union Depot and R. R. Co., 7 Colo. 512.
O'Mahoney vs. People, 24 Colo. 524.

The general repealing clause in said Chapter 81, of course, does not amount to an express repeal of anything and probably does not repeal anything that would not have been repealed without it. See 25 Ruling Case Law, page 912, Sec. 165.

But even assuming that Sec. 2695, C. L. 1921, was not repealed or modified by Section 14 of said Chapter 81, I doubt very much if said Section 2695 establishes a lien for the payment of assessments made under Section 2681. I mean a lien that could be enforced by a foreclosure sale of the stock. Section 2695 does provide that no sale of bank stock shall be valid as against the bank so long as the holder is indebted to the bank and that dividends on the stock shall be retained by the bank to apply on such indebtedness. But that section does not purport to confer power upon the bank to seize and sell the stock to satisfy the indebtedness of the stockholder. It only provides that dividends shall be retained by the bank to be applied upon the indebtedness.

> "A corporation has no power to forfeit or sell shares of its stock for non-payment of assessments or calls unless the power has been expressly conferred upon it by its charter or the general law."

2 Fletcher Cyc. of Corporations, Sec. 662, page 1488.

Again it will be noted that Sec. 2681, C. L. 1921, is the section that expressly provides for assessments to restore impaired capital and this section does not create any lien on account of such assessments but only provides that "an action may be commenced by said bank to recover the same." If the general assembly had intended to establish a lien upon the stock for the enforcement of assessments to make good impaired capital it would seem that Section 2681 is the place where such declaration would naturally have been made.

In the case of *Allen vs. McFerson,* 77 Colo. 186, the court held that a personal action could be maintained against the stockholder to recover an assessment to restore impaired capital.

In that case Allen contended that the only remedy was a suit to foreclose a lien upon the stock. Section 2695 was not mentioned in the briefs filed by either party. This case does not hold that a foreclosure suit could not be maintained. It only holds that a personal action could be maintained, but the case was vigorously contested and it is significant that neither counsel nor court mentioned Section 2695 as having any bearing on the controversy. In view of the doctrine laid down by Fletcher that liens for the enforcement of assessments do not exist unless expressly declared by statute, and in view of the fact that Section 2681 makes no mention of any such remedy but only provides for "an action" and in view of the fact also that Section 2695 does not declare that the stock may be seized and foreclosed to satisfy the indebtedness of the creditor to the bank, I am of the opinion that assessments to restore impaired capital cannot, by virtue of anything contained in the banking act, be enforced by foreclosure proceedings against the stock.

You will note that Section 13 of said Chapter 81, S. L. 1927, provides for proceedings against the certificate owner by injunction and otherwise in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, etc. Assuming that this recent act applies to bank stock, we are still met with the objection that Section 23 of that act expressly repeals the code provisions fixing the method of attaching shares of corporate stock. So, it is difficult to see how this stock could now be subjected to attachment proceedings.

You will also note that Secs. 5905 to 5910, C. L. 1921, are expressly repealed by said Chapter 81. These repealed sections provided the method of levy of execution upon shares of capital stock.

In view of the above I doubt very much if there is any remedy for the recovery of an assessment made by the board of directors of a state bank to restore its capital except the personal action that appears to have been contemplated by Section 2681.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
CHARLES ROACH,
Deputy Attorney General.

398. INSURANCE LAW

To Jackson Cochrane, June 20, 1928.

A company which proposes to issue contracts whereby it undertakes to pay an ascertainable sum to a beneficiary upon the happening of a specified contingency, must comply with the Colorado insurance laws.

399. INSURANCE LAW

To Jackson Cochrane, June 20, 1928.

A company such as Modern Pioneers of America, organized under the Colorado "not for profit" act, which does not itself write insurance, but which acts as an intermediary between its members and an insurance company, does not come under the Colorado insurance laws.

400. SCHOOLS

To S. J. Shadel, June 23, 1928.

The school district is not liable for injuries received by pupils while being transported to and from school.

A union high school district which has failed to keep its organization and has levied no school tax nor conducted any school for a number of years should be annulled and its territory annexed to the county high school district.

401. MENTAL DEFECTIVES

To Dr. Carl W. Plumb, June 25, 1928.

Inmates of the State Home for Mental Defectives can be released only upon an order from the court committing them to the home.

402. MOTOR VEHICLES

To J. S. Brown Mercantile Co., June 27, 1928.

No salesman has the right to carry any person in his automobile over the public highways of Colorado and receive compensation therefor without complying with the laws of Colorado.

403. TAX SALES

To A. P. Rodriguez, June 27, 1928.

There is no provision in the Colorado statutes for the redemption of a fractional portion of the land mentioned in a tax sale certificate, provided, the lands so sold are such as might properly be contained in a single sale; and the county treasurer could not be required to permit redemption of any *part* of the land covered by the tax sale certificate.

404. UNIVERSITY OF COLORADO

To Board of Regents, June 28, 1928.

The board of regents should reimburse the general fund without further delay for the moneys advanced to it pursuant to Chapter 72, S. L. 1911.

405. **SCHOOLS**

To Ithal Jenkins, June 28, 1928.

The Colorado statute authorizing voting by mail has no application to school district elections.

406. **DANCE HALLS**

To W. L. Kramer, June 29, 1928.

Under the law no person may maintain a dance hall without first making application to the county commissioners for a license. Violations of the law are punishable by fine or imprisonment or both. Justices of the Peace have jurisdiction to try such cases.

407. **COUNTY OFFICERS**

To William Barber, June 30, 1928.

In making charges for transcripts, public stenographers may not charge for punctuation marks as for words. *Walsh v. Jackson*, 33 Colo. 454; 81 Pac. 258.

See also letter to Fred O. Pearce, April 24, 1925, defining the word "folio" to mean one hundred words, punctuation marks not being considered.

408. **SCHOOLS**

To Charles Hollister, July 6, 1928.

There is no statutory authority for appointment of deputy secretary of school district.

409. **TRUST COMPANIES**

To Grant McFerson, July 6, 1928.

Trust companies should so conduct their business as not to deceive the public as to the identity of an associated company which might be mistaken for the trust company itself.

410. **CORPORATIONS**

To Charles M. Armstrong, July 9, 1928.

Certificate of change of address of business agent required by sub.-Sec. 10 of Sec. 2243, C. L. 1921, is not an amendment to the articles of incorporation requiring a fee of $5 for filing an amendment.

411. **SCHOOLS**

To Frank L. Fair, July 11, 1928.

Proceeds of bonds, voted for erecting a school building, may be used for purchase of hotel building and remodeling same to fit it for school purposes.

Conveyance of school property in part payment is in effect a sale thereof and must be authorized by a vote of the electors.

412. SCHOOLS

To Ruby S. Billington, July 12, 1928.

Under Sec. 8356, C. L. 1921, a qualified elector is one who has paid a school tax in the district, in the *twelve months* preceding the election, or in the *calendar year* preceding the election.

Illegal votes cast do not invalidate an election, but such votes must be thrown out in case of contest.

If any taxpayer desires to contest the election, he may do so, but it is not for the board to do so.

413. TAX DEED

Mr. L. M. Perkins, July 13, 1928.

While "counties, cities, towns or cities and counties" may receive tax certificates under Sec. 1, Ch. 152, S. L. 1927, unless a county is also a city (as Denver) it may not take a tax deed issued on a tax certificate.

414. GENERAL ASSEMBLY

A state brand inspector is not a civil officer under the statute and the incumbent of such office is therefore eligible to election as a member of the general assembly.

To Raymond Miller, July 18, 1928.

Dear Sir:

You have verbally requested an opinion of this office as to whether or not a person who is now a state brand inspector can legally be elected to the office of state representative and act both as a state representative and as a state brand inspector.

Sec. 8, Art. V, of the Colorado Constitution, provides thus:

> "No senator or representative shall, during the time for which he shall have been elected be appointed to any civil office under this state; and no member of congress, or other person holding any office (except of attorney-at-law, notary public, or in the militia) under the United States or this state, shall be a member of either house during his continuance in office."

The question to be determined, then, is whether or not a state brand inspector is a public officer within the meaning of this section. C. L. Sec. 3177 provides "The state board of stock inspection commissioners shall be authorized to appoint one chief brand inspector and such regular and special brand and sanitary inspectors as said board shall deem expedient and necessary for

the proper protection of the live stock interests of the state." By C. L. Sec. 3214, as amended by Sec. 5, Ch. 170, S. L. 1927, it is made the duty of the brand inspectors to inspect the brands and ear marks of any cattle, horses or mules to be transported from any point within the state to any point within or without the state, to make a report to the secretary of the state board of stock inspection commissioners of such inspection, and to furnish the owners of animals inspected a certificate of such inspection. C. L. Sec. 3208, as amended by Sec. 1, Ch. 170, S. L. 1927, requires the brand inspectors to collect a fee to be determined by the board of stock inspection commissioners before issuing any certificate of brand inspection. C. L. Sec. 3210, as amended by Sec. 3, Ch. 170, S. L. 1927, make it unlawful for any railroad company to receive for transportation any cattle, horses or mules until the same have been inspected by a brand inspector, and a certificate of authority for shipment issued. C. L. Sec. 3211, as amended by Sec. 4, Ch. 170, S. L. 1927, makes it the duty of the brand inspector to inspect cattle, horses or mules upon application of their owners, or of transportation companies shipping such animals.

Such being the powers and duties of a brand inspector we are of the opinion that this is not a public office such as would prevent an incumbent thereof from being a member of the general assembly.

It is a general rule that a position is a public office when it is created by law with duties cast on the incumbent which involve an exercise of some portion of the sovereign power, and in the performance of which the public is concerned, and which are continuing in their nature and not occasional or intermittent (see 53 A. L. R. 595).

The position of brand inspector is created by law, but it does not, in our opinion, involve the exercise of any portion of the sovereign power of the state. In its final analysis the powers and duties of the brand inspectors consist solely of inspecting brands, issuing certificates and collecting the tax. In the performance of each of these duties, the inspector is under the absolute control of the state board of stock inspection commissioners. An inspector does not have the power to make arrests or dispose of cattle because of violations of the law. It has been pointed out in a very comprehensive annotation found in 53 A. L. R., commencing on page 595, that in determining whether or not a position is an office or employment, it is important to consider whether or not there is a fixed tenure, whether or not there is an official bond, and whether or not the incumbent is required to take an oath of office. A state brand inspector does not have any fixed tenure, but under C. L. Sec. 3177 holds his position only as long as the board shall deem it "expedient and necessary for the proper protection of the live stock interests of the state." The civil service amendment does not have the effect of making this a fixed tenure. See *Lee*

v. Morley, 79 Colo. 481. There is no provision in the statutes requiring an inspector to give a bond, neither is there any provision requiring an inspector to take an oath of office. It appearing then that a brand inspector does not exercise any of the sovereign powers of the state, does not have a fixed tenure, does not give an official bond, and does not take an oath of office, it is our best judgment that the position is not a public office and that an incumbent thereof could legally become a member of the general assembly without violating the provisions of Sec. 8, Art. V of the Constitution.

We wish to point out, however, that there being no decision of our supreme court on this subject, it is possible that it might be held by the courts that a brand inspector is a public officer. Until there is such a decision it must be said that there is some uncertainly in this matter and hence this opinion can be considered as advisory only.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
CHARLES ROACH,
Deputy Attorney General.

415. PENITENTIARY

The powers of the warden are defined by statute.

To F. E. Crawford, warden, July 19, 1928.

Dear Sir:

You ask this office to advise you "whether or not a prisoner can be held on his long end for offenses other than an escape, an attempt to escape or murderous assault." Further you ask this office to advise you whether or not the "continued infraction of the rules would give the warden authority to hold him for his maximum sentence."

The statutes of Colorado provide that the court sentencing the prisoner may fix the maximum and minimum term that the prisoner shall be confined (Sec. 7156, C. L. 1921). Once the prisoner is confined in the penitentiary he is permitted a deduction of time from his sentence for good conduct (Sec. 756, C. L. 1921). The prisoner is allowed additional good time not to exceed ten days in any one calendar month when he is made a trusty prisoner engaged in work connected with the penitentiary outside the walls of the institution. Such good time is allowed in addition to that allowed by Sec. 756, when the board of corrections so orders (Sec. 757, C. L. 1921). Further the board of corrections is empowered to adopt a special rule for additional good time as authorized by Sec. 758, C. L. 1921. By Sec. 759, the prisoner shall forfeit *all* deductions of good time from the term of his sentence if he

shall escape or attempt to escape. And it is only for these two offenses that all deductions of good time may be made.

For willful violation of any of the rules or regulations of the penitentiary the prisoner shall forfeit for the first offense two days, for the second offense four days and for each subsequent offense four days. This is provided for by Sec. 760, C. L. 1921.

We desire to call your attention to the fact that Sec. 7158, C. L. 1921, gives the governor of the state of Colorado authority under such rules and regulations as he may prescribe to issue a parole to any convict, except life prisoners, who may have served the minimum term pronounced by the court, or in the absence of a minimum term pronounced by the court the minimum term provided by statute for the crime for which he was convicted. This is a discretionary power in the governor's hands. By the same section it is provided, however, that any convict who shall make an assault with a deadly weapon upon any officer, employee or other convict of said penitentiary *shall not be eligible* to parole.

In view of the citation of authority above set forth, it is our opinion that the warden may require a prisoner to serve his maximum sentence only when he has been guilty of escaping from the penitentiary, attempting to escape or murderous assault. Where the prisoner has been guilty of a continued infraction of the rules, the warden does not have authority to hold him for his maximum sentence, but where the violation of the rules is willful the prisoner shall have deducted from his record of good time for good conduct two days for the first offense, four days for the second offense and four days for each subsequent offense, all as provided for by Sec. 760, C. L. 1921.

The prisoner may at the expiration of his minimum sentence make application for parole, and the governor is empowered to grant or deny such application, all as provided for by Sec. 7158, C. L. 1921.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
WILLIAM W. GAUNT,
Assistant Attorney General.

416. PRINTING

To Roy S. Lobdell, July 20, 1928.

While there may be some doubt as whether the printing of a brand book would come within the terms of Sec. 453, C. L. 1921, it would be the better practice for the board of stock inspection commissioners to assume that it does so, and let the

contract for printing within the state, subject to the exceptions and conditions stated in the statute.

It is possible that the printing of such book would come within the classification of Sec. 5413, C. L. 1921, in which case it would have to be printed by the person holding the contract for the state printing.

417. SHERIFFS' FEES

To John G. Davis, July 23, 1928.

Sec. 7928, C. L. 1921, authorizes the sheriff of a county to collect actual traveling expenses when serving civil summons, in addition to a charge of 10 cents per mile, as authorized by Sec. 7882, for mileage.

418. PLUMBING INSPECTOR

To Irving A. Fuller, July 23, 1928.

Municipalities are authorized to prescribe rules and regulations governing plumbers. Such ordinances, however, shall not conflict or be inconsistent with the state statutes governing plumbers, or any regulation adopted by the state board of health.

419. COLLECTION AGENCY BONDS

To Charles M. Armstrong, July 23, 1928.

Ch. 77, S. L. 1927, contains no provision for the renewal of the bond provided for, and this omission cannot be corrected by incorporating a provision in the bond, which must conform to the statute.

> "The rule is that, unless the words in which the guaranty is expressed fairly imply that the liability of the guarantor is to be limited it continues until the guaranty is revoked." Brand on Suretyship, cited in 121 Ind. 478.

420. TAXATION

To E. B. Morgan, July 23, 1928.

Under Sec. 7308, C. L. 1921, the mileage of motor bus and automobile lines used by express companies, may be included as miles of railroad within the limits of a county in distributing the valuation of the express company's property to such county for the purposes of taxation.

421. NOTARY PUBLIC

To Chas. M. Armstrong, July 24, 1928.

One who is a party to an instrument cannot act as notary public with reference thereto.

One co-partner cannot, as notary, take the oath of his co-partner in a matter in which the firm is interested.

He cannot act as notary in any matter in which he is interested.

422. CITIES AND TOWNS

To Ernest W. Kerr, July 24, 1928.

A notice of incorporation must be published in legal newspaper to be effective.

423. ELECTIONS

To Fred O. Pearce, July 26, 1928.

"Duly accredited delegates," on page 320, S. L. 1927 (Ch. 98, S. L. 1927), defined to mean delegates elected with proper credentials accredited by the county assembly.

424. ELECTIONS

To Blake Rogers, July 27, 1928.

When a person purporting to be a county chairman of the Republican party submits to the county commissioners lists of election judges which are regular in form, the county commissioners are bound to accept such lists for filing and should reject any other lists which purport to be for the same party.

425. INSURANCE LAW

To Jackson Cochrane, July 28, 1928.

Under the provisions of Sec. 2529, C. L. 1921, it is necessary for insurance commissioner to approve form of policy issued by insurance company, but it is not necessary for him to approve bonds issued by such company which are not insurance policies.

426. INSURANCE

To Jackson Cochrane, July 28, 1928.

The question of whether or not, in accepting a note in payment of a life insurance premium, it is permissible to make collection without charge of interest, depends upon the facts of each particular case.

The fact that there is a failure to exact interest upon notes given for a short period, according to the customary manner of doing business, does not violate the anti-rebate law.

427. MILITARY DEPARTMENT

To Paul P. Newlon, July 28, 1928.

In the absence of legislation providing for appointment of

officers by company to fill vacancies, such appointment must be made by the governor.

428. MILITARY DEPARTMENT

To Paul P. Newlon, July 25, 1928; July 30, also.

Officers in the Colorado National Guard on active duty are not entitled to a per diem allowance for hotel expenses in addition to the regular commutation of heat, light and quarters.

However, in view of the fact that there is some doubt on this question, if an order under which such officers make trips about the state, provides that they are entitled to hotel expenses, they may receive the same, because of the fact that regular army officers would receive such allowance under like circumstances.

429. ELECTIONS

To John H. White, July 31, 1928.

When the county assembly receives the credentials of the delegates and the credentials committee makes its report and the report is adopted by the convention, the duly accredited delegates are those delegates whose credentials are in proper form and "duly accredited" by the assembly. The number of votes necessary to designate a candidate would be 20% of the duly accredited delegates.

The number of delegates in actual attendance at the convention has nothing to do with the number of votes required for designation.

430. COMMISSIONER OF MINES

To John T. Joyce, Aug. 4, 1928.

Inspectors for respective mining districts shall be appointed by commissioner from list certified by civil service commissioner.

431. ELECTIONS

To Mrs. Florence Theodoran, Aug. 7, 1928.

A candidate defeated in assembly may secure designation in the primary by petition, but if defeated in primary shall not be eligible as candidate for same office in next general election.

432. ELECTIONS

To W. D. Harry, Aug. 7, 1928.

Candidates may be designated by petition signed by requisite number of signers and filed with secretary of state and in office of county clerk.

433. ELECTIONS

To Benj. T. Hart, Aug. 7, 1928.

There is no statutory provision prohibiting county or state officials from being elected for more than one term, except as to state auditor and state treasurer (Sec. 21, Art. IV, Colo. Constitution).

434. MOTOR VEHICLES

To D. J. Van Bradt, Aug. 9, 1928.

Ch. 135, S. L. 1927, requiring additional registration license fee on motor vehicles, provides for a penalty for the violation of the act because of the words:

> "All such additional fees to be collected, paid over and distributed at the same time and in the same manner as the license fees provided for by Ch. 161, S. L. 1919, and acts amendatory thereof."

435. ELECTIONS

To C. M. Wilson, Aug. 9, 1928.

Where a candidate is designated by assembly and fails to file acceptance within required time, there is no legal reason why he may not have his name placed on the primary ballot by petition.

436. PROHIBITION LAW

Hon. Charles M. Armstrong, Aug. 9, 1928.

Issuance of permits for liquor for use in hospitals for treatment of alcoholism must comply with Secs. 3715 to 3718, C. L. 1921.

437. ELECTIONS

To J. G. Lopez, Aug. 10, 1928.

The withdrawal of a candidate who has filed his certificate of acceptance must be filed with proper officer ten days before election (See. Sec. 7567, C. L. 1921).

438. SCHOOLS

To Paul M. Williams, Aug. 10, 1928.

Bonds may be redeemed or purchased with surplus in special fund.

439. STATE HOSPITAL

To F. H. Zimmerman, Aug. 11, 1928.

Status of criminals confined in state hospital by reason of plea of "Not guilty by reason of insanity" is same as those committed

by the county court as to authority of the superintendent to discharge.

440. ELECTIONS

To Chas. M. Armstrong, Aug. 13, 1928.

Where two or more candidates receive the same number of votes in assembly for the same office, they should be certified by the secretary of state in alphabetical order.

441. PROHIBITION

To H. S. Marx, Aug. 13, 1928.

Transportation by express company of shipments of intoxicating liquors for authorized purposes to persons authorized by law to accept delivery of such shipments, is lawful.

442. ELECTIONS

To Harley Williams, Aug. 15, 1928.

A candidate who failed to receive assembly designation may secure designation by petition.

443. TAX CERTIFICATES

To Frank D. Allen, Aug. 15, 1928.

When by mistake of county officers in offering property for sale when county holds outstanding tax sale certificate, the county shall hold the purchaser harmless by paying him the amount of the principal and interest at the rate of 8%.

444. ELECTIONS

To Chas. M. Armstrong, Aug. 15, 1928.

1. A vacancy committee has no right to act prior to primary.

2. A person whose name is written on primary ballot by a majority of the electors becomes the nominee and must be certified as the candidate.

445. MOTOR VEHICLES

To Chas. M. Armstrong, Aug. 15, 1928.

Although a motor vehicle may have paid the additional registration fee (prescribed by Ch. 135, S. L. 1927) of a truck it has no right to operate if it comes within the provisions of Ch. 134, S. L. 1927, defining a common carrier.

A "contract carrier" may become a common carrier under the facts and circumstances surrounding his own particular case.

446. CORPORATIONS

To Wm. D. Morrison, Aug. 16, 1928.

Publication of notice to stockholders required by Sec. 2292 may be waived by the stockholders as provided for in Sec. 2263.

447. ELECTIONS

To Nelle Burr, Aug. 16, 1928.

In primary nominating petition, an elector signing must sign personally in two places—upon petition and in affidavit.

448. SOLDIERS' AND SAILORS' HOME

To Board of Barbers' Examiners, Aug. 16, 1928.

Commissioners of the S. and S. Home are given general powers by Sec. 699, C. L. 1921, to adopt rules and regulations governing the home.

Barbers employed at the S. and S. Home are not exempt from the provisions of the act regulating barbers (Secs. 4739-4755, inc.).

449. INSURANCE

To Jackson Cochrane, Aug. 17, 1928.

A life insurance company doing business on assessment plan is not permitted to do business in this state (Sec. 2533, C. L. 1921).

450. ELECTIONS

If candidates for precinct committeemen can be placed upon the primary ballot by petition at all, there must be a separate petition for each precinct, signed by the requisite number of voters of such precinct.

To Blake Rogers, Aug. 17, 1928.

Dear Sir:

In your letter of the 16th inst. you state that the Republican party presented to you a certificate of designation of a list of candidates for the different county offices in your county properly certified by the chairman and secretary of the Republican county assembly, which certificate you duly accepted and filed.

You state further that subsequently there was tendered to you a certain petition purporting to designate other persons for each of the several county offices upon the Republican ticket and that there was "appended to that petition of designation one committeeman and one committeewoman for each of the several precincts of the county" and that you were asked to place these names upon the official ballot for the primary election as candidates for committeemen and committeewomen of the Republican party.

You state that the petition in so far as it designates candidates for the various county offices, appears to be regular and sufficient in all respects but you question the right of the petitioners to append to the petition designees for the committeemen and committeewomen for the various precincts in the county and on this matter you request the opinion of this office.

There is a question in my mind as to whether or not under our primary law candidates for committeemen and committeewomen for the various precincts in a county may be designated by petition. In the case of *Stephen v. Lail*, 80 Colo. 49, our supreme court appears to have recognized the right to place candidates for committeemen and committeewomen upon the primary election ballot by petition but in that case the only question involved, discussed or determined appears to have been the sufficiency of the petitions themselves and no question seems to have been raised, discussed or determined as to the right to nominate candidates for committeemen and committeewomen by petition. However, you will note that in that case it appears that there was a separate petition filed for each precinct evidently signed by the requisite number of electors in each respective precinct.

Assuming that candidates for committeemen and committeewomen may be designated by petition as appears to have been conceded or assumed in the case above cited, I am of the opinion that such designations should be made by a separate petition for each precinct, each petition containing the signatures of the requisite number of electors in that particular precinct. I do not think that candidates for committeemen and committeewomen can be designated by simply appending their names to a single petition designating candidates for county offices. It, therefore, follows that you should disregard the names appended to the petition you mention as designees for the positions of committeemen and committeewomen of the respective precincts of your county.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
CHARLES ROACH,
Deputy Attorney General.

451. ELECTIONS

To Mr. J. G. Lopez, Aug. 21, 1928.

A party vacancy committee has no function to perform until after the primary election. Sec. 7552, C. L. 1921, expressly provides that vacancies in nominations occurring after any direct primary election may be filled by a party committee, but there is no provision in the primary act for the filling of vacancies occur-

ring before the primary election. Where a party assembly fails to make a designation for a particular office, or where the person or persons designated do not accept the designation, the vacancy can, of course, be filled by a nominating petition or the voters may write in on the ballot the name of the candidate of their choice.

452. ELECTIONS

Committeemen and committeewomen; methods of designation.

To Nellie Noble, Aug. 21, 1928.

In your letter of the 20th inst. you ask my opinion upon the following questions:

> "First—is it necessary for candidates for precinct committeeman and committeewoman who have been designated by the chairman and secretary of the precinct assembly or caucus to file a declaration of acceptance of designation by assembly with the county clerk within seven days after such assembly before the county clerk may lawfully place such names on the primary ballot?
>
> "Second—In precincts where there are no contests may the county clerk place the names designated by the chairman and secretary for the various precinct offices on the primary ballot without there first having been filed a declaration of acceptance of designation by assembly by each individual?
>
> "Third—May the names of persons designated by the chairman and secretary of the precinct assembly or caucus for committeeman and committeewoman, who have failed to file their declaration of acceptance of designation by assembly, but whose names have been petitioned within thirty days previous to the primary election, be placed upon the primary ballot by the county clerk?"

These questions will be discussed in the order propounded.

Your first question concerns the necessity of candidates for precinct committeeman and committeewoman filing a written acceptance of the designation made by the precinct assembly or caucus and whether in the absence of such written acceptance you should place the names of such candidates upon the primary ballot. Sec. 7535, C. L. 1921, provides that any candidate designated by an assembly shall file his written acceptance of such designation with the officer with whom certificates and petitions are required to be filed, but that section has to do with the subject of designation of candidates for nomination while Section 7552 provides for the election by each political party at each primary election of

a committeeman and committeewoman for each precinct. In other words, under Section 7535 candidates for nomination to an office must file their written acceptances of the designation for such nomination, but the statute does not expressly say that a candidate for election at a primary must likewise file his acceptance of designation for such election. At primary elections candidates for public offices are nominated by the respective political parties and at such primary election each political party elects the personnel of its party organization and it does not necessarily follow that candidates for election as members of the party organization are required to file written acceptances, although candidates for nomination to public offices are by Section 7535 clearly required to file such written acceptances. The statute is not entirely clear upon this subject but in cases where the chairman and secretary of the precinct assembly or caucus has filed a certificate of designation of candidates for precinct committeeman and committeewoman I would advise you to put such names upon the ballot even though such candidates had filed no written acceptance.

I am not sure that I understand your second question which concerns "precinct offices." If by "precinct offices" you mean committeeman and committeewoman of the precinct then your second question has been covered by my answer to your first question, but if by "precinct offices" in your second question you have reference to other offices than committeeman and committeewoman, such as justice of the peace or constable, then I would say that candidates for such offices would be required by Section 7535 to file their written acceptances.

You finally ask if the names of persons designated by the chairman and secretary of the precinct assembly who have failed to file their written acceptances, but who have been nominated by petition within the prescribed time prior to the primary election may be placed upon the primary ballot by you as county clerk. I have some doubt as to whether candidates for committeemen and committeewomen can be nominated by petition at all but in the case of *Stephen v. Lail*, 80 Colo. 49, the supreme court recognized that candidates for committeemen and committeewomen might have their names placed upon the ballot by petition. The point was not raised in that case and the court merely assumed that such candidates could go upon the ballot by petition. The only question involved in the case was the sufficiency of the petitions themselves. In view of this decision I would advise you to place upon the ballot the names of candidates for precinct committeemen and committeewomen who have filed sufficient petitions within the prescribed time even though such candidates

had already been nominated by precinct caucus and had failed to file their written acceptances.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
CHARLES ROACH,
Deputy Attorney General.

453. HAZING

To Jas. G. Patton, Aug. 22, 1928.

"It shall be unlawful for any person to engaged in any of those practices commonly called 'hazing' or in any acts of torturing, tormenting or in any way maltreating a fellow inmate, employee or student." Sec. 6701, C. L. 1921. Penalty found in Sec. 6703, C. L. 1921.

454. MOTOR VEHICLES

To Marcus C. Leh, Aug. 23, 1928.

There is a penalty contained in the law for the violation of the provisions of Chapter 135. The title of the act says:

> "To regulate the use of motor vehicles and trailers used in transporting passengers and freight for hire on public highways. Providing compensation for the use of such highways, and providing penalties for the violation of this act."

Thereafter in Section 1 is found the following language:

> "all such additional fees to be collected, paid over and distributed at the same time and in the same manner as the license fees provided for by Chapter 161, Session Laws of Colorado, 1919, and acts amendatory thereof."

Section 1360, Compiled Laws of 1921, which is one of the provisions of the 1919 act referred to in the above quotation, says:

> "Any person violating any of the provisions of this act, unless otherwise specifically provided for in this act, shall upon conviction be subject to a fine or penalty of not more than one hundred dollars ($100) or imprisonment in the county jail for a period of not exceeding ninety days, or by both such fine and imprisonment."

The legislature may adopt the provisions of a former statute by specific reference in the manner which was followed in this instance and the language of the statute so adopted becomes as much a part of the law as if it were specifically set out in the later enactment.

"Where one statute adopts the particular provisions of another by a specific reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute."

Lewis Sutherland Stat. Const., Vol. II, Sec. 405.
Dunham v. Linderman, 10 Okla. 570, 64 Pac. 15.

455. TAXATION

To Moulton Chambers, Aug. 23, 1928.

Migratory live stock.

The domicile of owner would be the county wherein live stock would be subject to assessment and taxation.

453. ELECTIONS

To B. D. Bradley, Aug. 23, 1928.

The duty is upon the candidate to see that his acceptance of designation is filed with the proper custodian and at the proper time and place.

Loss in U. S. mail does not cure or change situation.

457. COLORADO AGRICULTURAL COLLEGE

To Dr. Chas. A. Lory, August 24, 1928.

Sec. 3068, C. L. 1921, provides that the head of the Department of Animal Husbandry of the State Agricultural College "is hereby declared to be ex-officio State Dairy Commissioner" and the same section provides that the state dairy commissioner shall receive a salary of $600.00 per year and expenses, etc. The effect of this statute is to give the head of the Department of Animal Husbandry a separate and distinct state office by virtue of the fact that he is the head of such department. These positions are separate and distinct and I think the law intended that the salary of the head of this department in his capacity as state dairy commissioner should be over, above and in addition to his regular salary as head of the department of animal husbandry.

458. ELECTIONS

To A. L. Taylor, Aug. 24, 1928.

Under Sec. 7662, C. L. 1921, candidates for committeemen and committeewomen may act as watchers at primary election.

459. **PUBLIC UTILITIES**

Public Utilities Commission has no authority to assess fines and punish as for contempt of court.

To Worth Allen, Aug. 27, 1928.

Dear Mr. Allen:

We have your request for an opinion as to the authority of the Public Utilities Commission to assess fines and to punish as for contempt those who fail or neglect to obey, observe or comply with the orders, decisions, rules, etc., of that body in respect to motor busses and trucks. A copy of a letter written by W. A. Alexander to your commission in which he expresses the opinion that it possesses such power has also been received and given consideration.

It is our opinion that such authority does not exist for two reasons: First, that the Public Utilities Commission is an administrative body and the legislature has no power under the constitution to authorize such a body to exercise this highest judicial function; and second, that Chapter 134, Session Laws of 1927, does not contain by express words or by reference any statutory grant of such authority.

Article 3 of the Colorado State Constitution, on the distribution of powers, says:

> "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."

In the case of *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447, where the question involved was the right of the Circuit Court of Appeals to punish for contempt a person who violated an order of the Interstate Commerce Commission, the Supreme Court of the United States said:

> "The inquiry whether a witness before the commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that can not be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the constitution, and considered in *Anderson v.*

Dunn, 6 Wheat. 204, and in *Kilbourn v. Thompson,* 103 U. S. 168, 190, of the exercise by either house of congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See *Whitcomb's Case,* 120 Mass. 118, and authorities there cited."

The exceptions enumerated in the cases mentioned do not include the situation which your inquiry raises.

In the case of *Langenberg v. Decker,* 16 L. R. A. 108, 113, the question for determination was the right of the State Tax Commission to punish as for contempt under express statutory authority. In closing a statement to the effect that this power belongs to the judiciary, the Indiana Supreme Court said:

"So again, in the case of *Re Mason,* 43 Fed. Rep. 510, in which Mason had been committed by a United States circuit court commissioner for contempt in failing to appear and testify as a witness, the court said: 'To arrest and punish for a contempt is the highest exercise of judicial power, and belongs to judges of courts of record or superior courts. Where jurisdiction exists there can be no review. A pardon by the executive is in most cases a mode of release. This power is not, and never has been, an incident to the mere exercise of judicial function, and such power cannot be upheld upon inference and implication, but must be expressly conferred by law.' As bearing upon the question now under discussion, see also *In re McLean,* 37 Fed. Rep. 648; *Anderson v. Dunn,* 19 U. S. 6, Wheat. 204, 5 L. ed. 242; *Shoultz v. McPheeters,* 79 Ind. 373; *Vandercook v. Williams,* 106 Ind. 345, 5 West. Rep. 248, and 106 Ind. 355, 5 West. Rep. 251; *Ex parte Milligan,* 71 U. S., 4 Wall. 2, 18 L. ed. 281; *Gregory v. State,* 94 Ind. 385; *Whitcomb's Case,* 120 Mass. 118, 21 Am. Rep. 502.

"These cases lead to the inevitable conclusion that the power to punish for contempt belongs exclusively to the courts, except in cases where the constitution of a state expressly confers such power upon some other body or tribunal. Our state constitution confers such power upon the general assembly, but upon no other body. The doctrine that such power rests with the courts alone is

based upon the fact that a party cannot be deprived of his liberty without a trial. To adjudge a party guilty of contempt for a refusal to answer questions, the tribunal must determine whether such questions are material, and whether it is a question which the witness is bound to answer; otherwise it cannot be determined that the witness is in contempt of its authority in refusing to answer. So far as we are informed, the trial of a citizen, involving the question of his liberty, by any civil tribunal other than a court, has never been sustained, unless the power to do so was conferred by some constitutional provision. For the reasons above given, our conclusion is that so much of the act under consideration as attempts to confer on the state board of tax commissioners power to fine and imprison for contempt is in violation of Sec. 1, Art. 3, of our state constitution, and is void. It follows that such board has no authority to fine the appellee, and commit him to the jail of Marion county, and that the Marion superior court did not err in ordering his release."

In a concurring opinion Chief Justice Elliott said, among other things:

"The authority to imprison resides where the constitution places it, and the legislature cannot give it a residence elsewhere. The authority is essentially a judicial one, abiding in the courts of the land. As it is a judicial power, it is not created by the legislature, nor vested by that body. The legislature cannot create judicial power, nor vest it in any tribunal. Judicial power, like all sovereign powers, comes from the people, and vests where the people's constitution directs that it shall vest. The legislature may name tribunals that shall exercise judicial powers, unless the constitution otherwise provides; but the power itself comes from the constitution, and not the statute. (Citing cases.) The legislature may distribute the judicial power in accordance with the constitution, but it cannot delegate that power, for the plain reason that it has none to delegate.

"If the state board can be regarded as a judicial tribunal in the true sense of the term, the distribution of authority to it to punish for contempt by imprisonment would be valid and effective, but it is not a judicial tribunal. It does, indeed, possess powers of a judicial nature, but so does every officer in the land, high or low, who has the slightest discretion as to the mode of exercising his duty, and yet nothing can be clearer upon principle and authority than that such an officer is not a judicial officer within the meaning of the constitution."

See also: *In re Blues,* 46 Mich. 268; *Llewellyn's Case,* 13 Pa. Co. Ct. 126; *Brown v. Davidson,* 59 Ia. 461; *In re Whitman,* 120 Mass. 118.

The Colorado Supreme Court has held that the Public Utilities Commission is not a court, that its duties are executive and administrative and while it must exercise judgment and discretion, it has no power to exercise judicial power in the sense that courts administer judicial remedies within the meaning of the constitution.

> "The public utilities commission is not a court; but is an administrative commission, having certain delegated powers, and charged with the performance of certain executive and administrative duties, and its powers are subject to the action of the courts in matters of which the courts have jurisdiction. The legislature did not give the commission power to render judicial decisions or jurisdiction over remedial rights as exercised by the courts. Judicial powers relate to the authority exercised by courts through the instrumentality of judicial remedies. The legislature did not confer upon the commission such judicial powers as courts are required to exercise in suits between litigants. The power to ascertain from the facts whether a railroad company should discontinue service upon and dismantle the road is delegated by the legislature to a commission. The commission acts upon the existence of facts which it must determine, but this is not the exercise of judicial power in a constitutional sense. In administering the law in such a case the commission must necessarily determine many things and facts; this involves investigation, and the exercise of judgment and discretion, incidental to the administration of the law. Because it is of a judicial nature or the exercise of quasi-judicial functions does not contravene the constitution. The determination of certain facts or things in the operation of the law is merely incidental to the administrative powers of the commission. The legislature could delegate power to determine the facts and things upon the decision of which the operation of the law is made to depend. This is not the exercise of judicial power by a commission in the sense that courts administer judicial remedies, but is incidental to the exercise of delegated administrative powers. The exercise of judgment and discretion as an incident to such power is not the exercise of judicial power within the meaning of the constitution. The authority delegated to the commission relates to the administration of the law and not to the exercise of judicial remedies."

People v. Colorado Co., 65 Colo. 472, 480.

See also: *Pirie v. Public Utilities Commission,* 72 Colo. 65, 67.

We are not unmindful of the fact that certain other commissions have been upheld in their exercise of this power; namely, those of the states of California, Florida, Oklahoma and Louisiana. It is our understanding, however, that the commission of each of those states has acted under express constitutional authority. We have also examined the Missouri Supreme Court decision, *In re Sanford,* 236 Mo. 665, which apparently takes an opposite position. But in that case the court held that as an arm of the legislative department the commission had the power to adjudge a man guilty of civil contempt as distinguished from criminal contempt.

In the case of *Wyatt v. People,* 17 Colo. 252, 258, the distinction between civil and criminal contempt was established by the statement that those acts which constitute civil contempt involve the disobedience of some judicial order entered for the benefit or advantage of another party to the proceedings, while criminal contempt is an act disrespectful of the court or its process, or obstructing the administration of justice, or tending to bring the court into disrepute. While this definition deals, of course, wth contempt of court, nevertheless the same distinction is probably recognized as to other classifications of contempt. Any contempt of your commission would, therefore, be criminal in character.

It is our opinion, therefore, that while your commission has been given the authority as has the interstate commerce commission to perform certain duties which require the exercise of discretion and the rendition of judgments which make their conduct judicial or at least quasi-judicial, nevertheless, the power to punish for contempt is not to be considered as one of the powers delegated to the public utilities commission by the legislature. In other words the power to punish for contempt is a judicial power of the kind mentioned in the constitution.

The second reason is based upon the proposition that while Ch. 134, Session Laws 1927, makes all provisions of the Public Utilities Commission act of the state of Colorado (Ch. 127, Laws of 1913) and all acts amendatory thereof, or supplemental thereto, in so far as applicable, apply to all motor vehicle carriers which are subject to the 1927 act, nevertheless the provisions on contempt contained in the 1913 act are excluded under the doctrine of *expressio unius est exclusio alterius.*

Sec. 39 of the 1913 act authorizes the commission and each commissioner to issue writs of summons, subpoenas, warrants of commitment and all necessary process in proceedings for contempt in like manner and to the same extent as courts of record.

Sec. 57 makes it the duty of the commission to see to it that the constitution and statutes are enforced and the attorney general and all district attorneys are required to institute and prosecute actions at its request.

Sec. 58 provides that utilities may be held liable for all loss, damages or injury, and permits the assessment of exemplary damages if the contempt is willful.

Sec. 59 provides that all penalties accruing under the act shall be cumulative and suit for a recovery cannot constitute to bar any criminal prosecution or the exercise by the commission of its power to punish for contempt. Sec. 60 provides that the commission may enforce its orders by directing the attorney for the commission to commence actions by mandamus or for injunctions in the district court.

Sec. 61 (a) fixes a penalty of not to exceed $2,000 for every offense by which any utility fails or neglects to observe, or obey any order or decision of the commission. Subdivisions (b) and (c) of this section make every violation a separate offense and provide that the act of any officer, agent or employee of a public utility shall be the act of the utility. Sec. 66 (a) makes any failure to observe or obey with any order of the commission except for the payment of money a contempt.

It should be noted that the new law does not in express terms specifically incorporate the provisions of Sec. 39, 57, 58, 59, 61 or 66 (a). However, Sec. 60 is found in the new law with the words "or Attorney General or District Attorney," inserted in two places, and with the provision added that a writ of error may be taken to the Supreme Court from final judgments by the District Court in actions of mandamus and injunction suits commenced at the request of the commission.

Sec. 21 of the 1927 law gives to district and county courts jurisdiction in all matters arising under this act.

In view of the fact, therefore, that Sec. 60 is the only one of the various sections concerning the infliction of punishment for violation of the commission's orders which is included in the latter act, it would seem that the remainder were intended to be excluded.

> "It is a general principle of interpretation that the mention of one thing implies the exclusion of another thing; *expressio unius est exclusio alterius.* The affirmative description of the cases in which the jurisdiction may be exercised implies a negative on the exercise of such power in other cases. The enumeration of certain powers in a statute relating to corporations implies the exclusion of all others not fairly incidental to those enumerated. Enumeration in a charter of incorporation of the purposes for which the corporation may acquire

title to real estate is necessarily exclusive of all other purposes. A statute directing a thing to be done by a specified officer or tribunal implies that it shall not be done by a different officer or tribunal. A statute that directs a thing to be done in a particular manner ordinarily implies that it shall not be done otherwise. Thus, an act providing a mode by which a county could incur liability on subscription to the stock of a railroad company and a mode of discharging that liability was held to exclude all other modes. It is a general principle that where a statute creates a right and prescribes a particular remedy, that remedy, and none other, can be resorted to. But the rule which excludes other remedies where a statute creates a right and provides a special remedy for its enforcement rests upon the presumed prohibition of all other remedies. If such prohibition is intended to reach the government in the use of known rights and remedies, the language must be clear and specific to that effect.''

25 R.C.L. 981.

It is our opinion, therefore, that those provisions of the 1913 act which give to your commission the right to assess fines and punish for contempt are not included within the provisions of Ch. 134, Session Laws of 1927.

While it has always been the policy of this office to assume the validity of every statutory enactment, in this particular instance where the members of the commission and every official who might participate in the punishment of an offender might be held personally liable were the law not to be held valid, we have been extremely slow to grant to this statute any construction which the absolute letter of the law did not seem to justify.

We are advised, as you state in your letter, that certain persons are not yet obeying the law as they should. However, the other sections of the statute which permit actions, both civil and criminal, to be commenced furnish methods which, if properly availed of, will eventually enable your body to require observance of its orders by all persons and utilities. This office will co-operate with you in every way possible to bring about this condition and will try to make arrangements in any case brought to our attention to bring any law violator into court under the provisions of the other statutes mentioned.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

RALPH CARR,
Assistant Attorney General.

460. **ELECTIONS**

To G. C. Twombly, Aug. 27, 1927.

Filling of vacancies on primary ballot: Nomination must be made by petition, or names of candidates written on ballot at polls.

461. **ELECTIONS**

To J. H. McHolland, Aug. 28, 1928.

A person may be nominated as a candidate for another office upon a petition of the "Independent Party" although theretofore a candidate for the office of sheriff has already filed a petition using that name.

Three or more candidates may be nominated for different offices upon certificate of nomination under the name of Independent Party or any other name which they may select which does not use any part of the name of a political party.

462. **COUNTY OFFICERS**

To L. C. Kinnikin, Aug. 28, 1928.

A sheriff, serving process in lunacy proceedings, may not break an outer door of a residence to serve such process.

463. **MENTAL INCOMPETENTS**

To Hon. J. F. Sanford, Aug. 28, 1928.

Estates of Mental Incompetents.

Claim of the state is a preferred claim, regardless of date accrued.

464. **TAX SALE CERTIFICATES**

To Grant Van Sant, Aug. 29, 1928.

Tax sale certificates are issued to irrigation districts in the same manner and subject to the same equities as to a private purchaser, upon payment of such sum as the county commissioners may decide. Sec. 1999, C. L. 1921.

465. **ELECTION**

To H. T. Hogan, Aug. 29, 1928.

A justice of the peace may take acknowledgments and affidavits, anywhere in his county.

Nominating petitions for *general* election may be circulated prior to *primary* election, provided they are filed between the dates provided by statute.

466. **INSANE**

To F. H. Zimmerman, Aug. 30, 1928.

There is no authority at the present time for permitting the sterilization of the insane wards of the state.

467. **SCHOOLS**

To W. S. Kennedy, Aug. 31, 1928.

Ch. 83, S. L. 1927, deals with county funds and is not in conflict with Sec. 8371, C. L. 1921, which deals with school bond redemption funds.

468. **CITIES AND TOWNS**

To Touchstone, Wright & Co., Sept. 4, 1928.

Funds for advertising and promoting community may be appropriated by trustees from funds raised by taxation.

469. **SCHOOLS**

To Nellie E. Fee, Sept. 6, 1928.

Outlying districts may become part of Union High School District under Sec. 8393, C. L. 1921, on vote of electors of district desiring so to join. Vote of Union High School District not necessary.

470. **HIGHWAYS**

To Maj. Blauvelt, Sept. 5, 1928.

Neither the highway department nor the members thereof as individuals are liable in damages for injuries incurred by persons traveling on state highways by reason of said highways being out of repair.

471. **INDUSTRIAL SCHOOL FOR GIRLS**

To Anna Cooley, Sept. 6, 1928.

Funds of school may not be expended for education, outside of state, of girl committed to the school.

472. **ELECTION**

To Mrs. J. C. Seevers, Sept. 6, 1928.

Registered voter may register his servants and all the members of his family at same address regardless of number but may register only three strangers who reside with him (see Sec. 7613, C. L. 1921).

473. ELECTIONS

To Messrs. Coffman & Cole, Sept. 8, 1928.

Ministers transferred by state conference to locations in other counties less than 90 days preceding the election are not legal voters in either county (Sec. 7726, C. L. 1921).

474. TAX CERTIFICATES

To W. S. Kennedy, Sept. 10, 1928.

The owner of a tax certificate is entitled to a tax deed after the expiration of three years, from the date of his certificate, regardless of intervening taxes.

475. ENGINEER—STATE

To M. C. Hinderlider, Sept. 13, 1928.

If water is lawfully diverted under decree of court the jurisdiction of the state engineer and his distributing officers ceases.

476. SCHOOLS

To S. R. Chubb, Sept. 15, 1928.

A school district has no power to lease school property for a period of ninety-nine years.

477. TAXATION

To Dr. S. N. Smith, Sept. 17, 1928.

A board of county commissioners has the same right to consider applications to abate taxes on personal property as on real property, under Sec. 7460, C. L. 1921.

478. APPROPRIATIONS

To State Commission for Blind, Sept. 19, 1928.

Balance left of appropriation made in 1927, may be used in paying benefiits for October and November, 1927.

479. SCHOOLS

To Carl Carlson, Sept. 20, 1928.

Sec. 2564, C. L. 1921, authorizing school districts to insure property in mutual fire insurance companies, is probably void as in conflict with Art. 11, Secs. 1 and 2, Colo. Const. (see 164 Pac. 1174, Idaho).

Opinion 134, Sept. 13, 1923, and No. 259, Sept. 27, 1926, disregarded.

480. **SCHOOLS**

To Jackson Cochrane, Sept. 21, 1928.

It is unlawful for a member of a school board to participate in the allowance of any contract for insurance, in a company in which he is interested as an agent or otherwise.

481. **ELECTIONS**

To G. C. Twombly, Sept. 21, 1928.

Covered by provisions of Sec. 7552, C. L. 1921, Central Committee may delegate to an executive committee power to fill vacancies after primary elections.

482. **ELECTION**

To Mrs. Nate Clark, Sept. 25, 1928.

A candidate for election is not disqualified by statute to serve as election officer.

483. **ELECTIONS**

To Harry Behm, Sept. 28, 1928.

In outlying precincts a voter can be registered on the day preceding the election only by taking the prescribed oath, corroborated by two registered voters.

Secs. 7595 and 7598, C. L. 1921, construed.

484. **APPROPRIATIONS**

To State Auditing Board, Sept. 28, 1928.

Appropriation made by Sec. 6532, C. L. 1921, for expenses of commissioners for the promotion of uniform state laws should be regarded as of the first class.

485. **ELECTIONS**

To Blake Rogers, Sept. 29, 1928.

The county clerk and recorder—not the county board—has the right to determine the printing establishment which shall do the work of printing and furnishing the ballots for election.

486. **ELECTIONS**

To Jas. T. Adams, Oct. 2, 1928.

In the absence of any showing of fraud, the fact that the three election judges in a precinct were of the same political faith, would not invalidate the election.

487. SCHOOLS

To Miss Katherine Craig, Oct. 3, 1928.

Normal Institute Fund should be apportioned equally among all the normal institute districts, regardless of the failure of any district to hold an institute during the year for which the distribution is made (Sec. 8285, C. L. 1921).

488. MOTOR VEHICLES

The facts and circumstances surrounding any particular case determine the classification of a motor truck carrier.

To Bradfield & Harbottle, Oct. 3, 1928.

Gentlemen:

You have requested an opinion from this office as to whether the Public Utilities Commission has jurisdiction over persons transporting goods by motor trucks over the public highways under express contracts with the consignors at contract rates and under circumstances where the carriers maintain no definite schedule and do not hold themselves out as common carriers.

In your letter of September 28, supplementing this request, you ask if there is "any limit to contracts that could be taken by a truck owner hauling goods over the public highways without coming under the jurisdiction of the Public Utilities Commission."

It is the opinion of this office that the facts and circumstances surrounding the particular case determine the classification of a motor truck carrier. The fact that he may do business only under express contracts, that he does not hold himself out to haul for all persons indiscriminately, and maintains no definite schedule will not remove him from the jurisdiction of the Public Utilities Commission under the provisions of Chapter 134, Session Laws of 1927.

A motor carrier under this law is defined as follows:

> "(d) The term 'motor vehicle carrier' when used in this act means and includes every corporation, person, firm, association of persons, lessee, trustee, receiver or trustee appointed by any court, owning, controlling, operating or managing any motor vehicle used in serving the public in the business of transporting persons or property for compensation over any public highway between fixed points or over established routes, or otherwise, who indiscriminately accept, discharge and lay down either passengers, freight or express, or who hold themselves out for such purpose by advertising or otherwise."

It would be impossible under the conditions surrounding this particular line of business to lay down a hard and fast rule as to what constitutes a common carrier. In the case of *Terminal Taxi-*

cab Co. v. District of Columbia, 241 U. S. 252, Mr. Justice Holmes said:

> "No carrier serves all the public. His customers are limited by place, requirements, ability and other facts."

In that case a taxicab company claimed that it was not to be classed as a common carrier because it carried only the guests of a certain hotel under a single contract with the proprietors thereof. The court held against this contention.

In a case involving the application of The Exhibitor's Film Delivery and Service Company for a certificate of public convenience and necessity, the Public Utilities Commission of Colorado held the applicant to be a common carrier although it did business under express contracts only with persons engaged in exhibiting motion pictures. In the course of that opinion it was said by Commissioner Worth Allen:

> "In order that a carrier be a common carrier it is not necessary that he serve the whole public. No common carrier does."
>
> * * * *
>
> "An examination of all the authorities, however, leads one irresistibly to the conclusion that in determining whether or not a given operator is a common carrier, the test is not whether he has separate written or other kind of formal contracts with each and every one of his customers. On the contrary, the test is whether he is serving a sufficiently large portion of the public in the carrying of those kinds of goods which he accepts. As is stated in the Campbell case (supra): 'For if the defendant, by reason of the circumstances, is a common carrier as to the goods in question, it cannot by any special contract change its status as such or exempt itself from the responsibilities growing out of that relationship.' "

The case referred to is *Campbell v. A. B. C. Storage and Van Company,* 174 S. W. 140.

You have suggested that the Colorado Commission has a rule that carriers operating under more than five contracts may be common carriers within the jurisdiction of that body. We think that you are in error as to this proposition. In one case involving a certain carrier operating at Greeley, the commission held that his five contracts did not make him a common carrier. This finding was made only after a consideration of the facts surrounding that particular case.

It is conceivable on the other hand that the same carrier operating under five contracts in a town of a thousand people might be held to be a common carrier.

As stated above, it is the character of the service performed, as determined by the proportion of the public for which he hauls within a given district, which furnishes the test.

It is true that the Oklahoma Supreme Court in the case of *Barbour et al. v. Walker, et al.,* 259 Pac. 552, laid down a rule which seems to hold that a person hauling under five or more contracts is a common carrier, but this has not been done in Colorado.

Our view of this case will find some support in the opinion of the Supreme Court in *Davis v. People,* 79 Colo. 642, where a carrier entered into a contract with a corporation to haul for the stockholders of the corporation. By this clever device, the carrier was enabled to serve an entire community under a single contract. The Supreme Court condemned it in no uncertain terms.

It is our opinion, therefore, that each case must be determined in the light of its own peculiar circumstances and conditions and a man who operates only under specific contracts may be a common carrier just the same as one who hauls indiscriminately for the general public.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

RALPH CARR,
Assistant Attorney General.

489. ELECTION

To Lillian Hardcastle, Oct. 9, 1928.

The provisions of Sec. 7681, C. L. 1921, requiring two of the election judges in each precinct to be of opposite political faith should be construed as directory rather than mandatory (20 C. J. 92, 181); therefore the acts of such a board are valid in the absence of fraud.

There is no statutory provision giving the county clerk power to remove an election judge.

490. TOWNS AND CITIES

Municipal corporations are not liable for damages resulting from acts of negligence of their employees in operating fire trucks, police and health vehicles.

To G. H. Bradfield, Oct. 9, 1928.

Dear Sir:

In your letter of the 2nd inst., you ask my opinion upon the following question, viz.:

> "Whether a municipality operating under the general laws of the state of Colorado can in any event

be held liable for damages resulting from acts of negligence of its employees in operating fire trucks, police vehicles and health vehicles."

It appears to be well settled that municipal corporations act in two separate and distinct capacities. First, they function as agencies of government; and second, they function also in a proprietary or corporate capacity. It is equally well settled that municipal corporations are not liable for the negligence of their servants and employees while engaged in carrying out governmental functions of the municipality, but that municipalities are liable for the negligence of their servants and employees while they are engaged in carrying out the proprietary or corporate functions of the municipality.

Upon this subject I quote from Section 2792, Volume 6, McQuillin on Municipal Corporations, 2nd edition:

> "A municipal government has a double function, first, the private, proprietary function, and second, the governmental function as the arm or agent of the state. The intermingling of these two functions has resulted in difficulty in determining the boundary line in separating the two. There is substantial unanimity, however, upon the proposition that the city when exercising its private or corporate powers, is liable to respond in damages for the negligence of its officers, agents and employees. On the other hand negligence in the performance of public duties by municipalities intrusted therewith is not imputable to the municipality. The neglect of a municipal corporation to perform, or its negligence in the performance of, a public duty imposed upon it by law is a public wrong to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect. It has been said that the only exception to this rule is where the injury is the result of active wrongdoing chargeable to the municipal corporation. While the municipal corporation in performing or omitting to perform a duty imposed upon it as an agent of the state in the exercise of strictly governmental or state functions is generally held not liable to private action on account of injuries resulting from the wrongful acts or negligence of its officers or agents, there is a wide divergence in the decisions as to what functions are governmental or public and what are private or corporate, and functions held to be governmental in some jurisdictions are held to be corporate in others."

The same doctrine is thus stated in Section 1701, 43 Corpus Juris:

"Generally in reference to liability for torts, it is held that a municipal corporation has a dual character, the one public and the other private, and exercises correspondingly twofold functions and duties. The one class of its powers is of a public and general character, to be exercised in virtue of certain attributes of sovereignty delegated to it for the welfare and protection of its inhabitants and the general public; the other relates only to special or private corporate purposes, for the accomplishment of which it acts, not through its public officers as such, but through agents or servants employed by it. In the former case its functions are political and governmental, and no liability ordinarily attaches to it at common law, either for nonuser or misuser of the power; and such immunity from liability does not depend upon the use of the best, or of any particular means in the conduct of the municipality's governmental business. Nor is the exemption from liability affected by the degree of negligence, whether ordinary or gross, although it has been intimated that the rule would be otherwise were the injury caused by willful, wanton, or reckless conduct. This doctrine does not, however, relieve a municipality from its obligation to perform its governmental duties, but merely relieves it from liability for a resulting injury. In its second character above mentioned, that is, in the exercise of its purely municipal functions, or the doing of those things which relate to special or private corporate purposes, the corporation stands upon the same footing with a private corporation for injuries resulting from its negligence while acting within the scope of such municipal power. The principal difficulty which courts have experienced has been in ascertaining, clearly and accurately, the line of demarcation between public or governmental duties and private or corporate duties, and not in the determination of the questions, whether, for a refusal to discharge a public duty, or for the manner in which it is discharged, the corporation is or is not liable. It has been held that for the exemption of municipal corporations from liability for acts done in the exercise of governmental powers should be strictly construed."

The Supreme Court of this state has clearly approved the general doctrine laid down by the text writers. In *Denver vs. Mauer,* 47 Colo. 212, the Court says:

"The authorities agree that two classes of general duties are imposed upon a municipal corporation. One is governmental, and the municipality is not liable for

negligence of employees occurring in the performance thereof. The other is private and corporate, and the municipality is liable for negligence of employees occurring in the performance thereof."

See also *Golden vs. Western Lumber and Pole Co.*, 60 Colo. 387; *McAuliffe vs. Victor,* 15 Colo. App. 337.

The general principle that the municipal corporation is not liable in damages for the negligence of its servants and employees who are engaged in carrying on its governmental functions, being thus established, it remains to be determined whether the conduct of police, fire and health departments is the exercise of governmental functions on the part of the municipal corporation, or whether, on the contrary, such activities constitute an exercise merely of corporate or private functions.

This juestion is also well settled by the authorities. From Vol. 6, McQuillin on Municipal Corporations, End edition, Section 2796, we quote:

"There are some duties the nature of which as governmental is too well settled to be disputed, such as the establishment and maintenance of schools, hospitals, poor houses, fire departments, police departments, jails, workhouses, and police stations, and the like. In fact, duties connected with the preservation of the peace or health, or the prevention of the destruction of property by fire are all governmental duties, without question, and hence there is no municipal liability for torts in connection therewith, or at least not under ordinary circumstances."

In speaking of police officers, it is said in 43 Corpus Juris at page 965 that:

"Their duties are of a public nature. Their appointment is devolved upon cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render the cities and towns liable for their assaults, trespasses, or negligent acts, while acting in the performance of such public duties, unless liability is imposed by statute, or unless the municipal charter or some special statute makes members of the police force agents of the municipality."

And with reference to fire departments, we quote from the same volume at page 967:

"The power to organize and maintain a fire department for the prevention of damage by fire is a public or governmental function, and a municipality will not

ordinarily be liable unless the statute so provides, for the wrongful or negligent acts or omissions of the department or its employees in the performance of their duties, either in the actual work of extinguishing fires, or in otherwise discharging their functions as firemen, as in flushing the street in front of an engine house, or in testing or practicing with fire apparatus and appliances, or, generally where persons on the public streets are injured by the negligence of firemen driving vehicles employed in the fire department."

And with reference to the health departments, we quote from the same volume at page 971:

"The performance of duties that relate to the preservation of the public health and the care of the sick is of concern to the public as a whole; in executing this function the municipality and the officers through whom it acts perform governmental or public functions, and such officers are not agents of the municipality, but public officers, for whose wrongful acts or omissions the municipality is not responsible in the absence of a statute imposing liability, even though they are appointed by the municipal authorities."

In R. C. L. 19, at page 1117, the author says:

"As the extinguishment of fires is a governmental function, the firemen are not servants or agents of the city or town by which they are employed, so as to render it civilly liable for their misconduct or negligence. Thus it has been held that a city or town is not liable for injuries to a traveler on the highway who is run down by the negligent driving of fire apparatus or who is injured by obstructions or other dangers negligently placed in a highway by members of the fire department, or to a citizen who is injured by the defective condition of a fire engine house, or to a fireman or other employee of the fire department who is injured by defective apparatus."

And further on page 1119:

"A municipal corporation can under ordinary conditions incur no liability by reason of the defaults of its police department. The prevention of crime is a purely governmental function, undertaken for the benefit of the public at large, and, if police officers are appointed and paid by the various municipalities, this is done merely as a matter of convenient administration. Their duties are ordinarily prescribed by law, and they are public

officers and not the servants or agents of the city or town in which they serve. As already stated a municipality is not civilly liable at common law for the failure of its police officers to enforce the law and to suppress disorder and crime, and it is generally held that it is equally exempt from liability for wrongs and injuries inflicted by the policemen themselves, as for false arrest upon a groundless charge, or for the use of unnecessary violence in making an arrest, for negligence in the course of making an arrest resulting in injury to the person or property of the individual arrested, for negligence resulting in the injury of a bystander by careless shooting, for malicious injury to an innocent person, for trespass upon private property, or negligence causing consequent injury to real estate, or for impounding an animal running at large."

And further on page 1121:

"Even if the officers employed by a municipal corporation to assist in the preservation of the public health inflict injury to persons or property by their negligence, the corporation is not liable, for the preservation of the public health is a purely public or government function."

That the courts of this state are in accord with the general doctrine above laid down is, I think, apparent from the cases of:

The City of Denver vs. Davis, 37 Colo. 370.
The City of Denver vs. Maurer, supra.
Addington vs. Littleton, 50 Colo. 623.
McAuliffe vs. City of Victor, supra.

Of course, it is possible that a vehicle ordinarily used for fire, police or health purposes might on occasion be used by the municipality in the performance of one of its corporate rather than governmental functions. In that event, a cause of action for damages might arise out of the use of the vehicle, for as stated in the Davis case, *supra,* "the rule which determines the liability or non-liability of a municipality in cases of this nature, is the character of the duty performed rather than the department officer or agent of the corporation through whom the duty is performed."

For example, a vehicle ordinarily used for fire, health or police purposes, might conceivably be used for street cleaning purposes. If injury were occasioned to a citizen through the use of such vehicle for a corporate purpose, then the municipality might be held liable despite the fact that the vehicle belonged to one of the governmental departments above indicated.

Whether a possibility such as this would justify the expense of liability insurance on such vehicles is a question of judgment for your city authorities to determine.

My general conclusion is that except under extraordinary circumstances, such as above indicated, your city would not be held liable for damages resulting from acts of negligence of its employees in operating fire trucks, police vehicles and health vehicles.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.

CHAS. ROACH,
Deputy Attorney General.

491. ELECTIONS

To L. A. Poinsett, Oct. 13, 1928.

In election precincts outside of cities there is no permanent registry, a new list being made previous to each election. In making up this list the *poll* list of the last preceding election may be used, but not the *registry* list (Sec. 7597, C. L. 1921).

492. FIREMEN

To C. W. Wonderly, Oct. 16, 1928.

Under Sec. 9377, C. L. 1921, widows and families of deceased members of volunteer fire departments are entitled to death benefits.

493. SCHOOLS

To C. R. Buck, Oct. 18, 1928.

A school district may pay tuition in another district for a deaf and dumb pupil.

494. ELECTIONS

To Denzel L. Yarnell, Oct. 20, 1928.

No acceptance is required to be filed by a nominee after a primary election whose name was not printed on ballot, but was written in.

495. TRADE OR BUSINESS NAME

To Richard Aspinall, Oct. 23, 1928.

Infringement of established business rights is unlawful and offender may be proceeded against by injunction. 99 N. W. 650; 101 N. W. 491; *Internat'l Cheese Co. v. Phenix Cheese Co.*, 103 N. Y. Supp. 1, 172 Fed. Rep. 161.

496. SCHOOLS

Interpretation and discussion of Minimum Salary Law; State Aid.

To Colorado Tax Commission, Oct. 23, 1928.

Gentlemen:

We have your favor of the 19th inst. in reference to the proper construction of Sec. 7, Ch. 214, S. L. 1921, as amended by Sec. 3, Ch. 166, S. L. 1923, which was amended by Ch. 158, S. L. 1927.

The act of 1921 is commonly known as the Minimum Salary Law, and the assistance it provides for certain districts is commonly referred to as "State Aid." Section 7 of this act as originally enacted appears as Sec. 8452, C. L. 1921, and it reads as follows:

> "If in any county the said maximum rate of levy of five mills on the dollar shall be insufficient to raise or provide sufficient funds with which to pay the minimum salary of seventy-five dollars ($75.00) per month to every public school teacher within that county, as aforesaid, the county superintendent of schools, on or before the first day of June and December in each year, shall certify to the state superintendent of public instruction the said fact, together with the amount necessary to supply the deficiency. If the state superintendent of public instruction after investigation shall be convinced of the necessity as set forth in the certificate of the county superintendent, it shall be his duty before apportioning the public school income fund of the state, to apportion to such county, in addition to the amount otherwise specified, a sum of money sufficient to supply the amount of such deficiency as ascertained by him, and shall certify said apportionment to the state auditor. Upon such certificate, the state auditor shall draw his warrant on the state treasurer in favor of the county treasurer of such county for the amount so certified to be paid out of the public school income fund. The sum of money so paid into the treasury of the county shall be, by the county treasurer, placed in the said general school fund and used for the payment of teachers' salaries only. The remainder of said public school income fund shall be apportioned as provided by law."

The amendment of 1923 added the words, "Provided, that no school district shall share in such distribution which has not made a special school tax levy of three mills or more for the same year."

The amendment of 1927 substituted the words "five mills" for the words "three mills."

The reason for the amendment of 1923, as given the writer by one of the sponsors of the amendment, and who was at the time connected with the office of the state superintendent of public instruction, was that some districts took advantage of their right to state aid and refused to make a special levy, and the amendment was designed as a penalty imposed on those districts which relied entirely upon the state for the salaries of their teachers.

Section 7 as originally enacted ended with the words:

> "The remainder of said public school income fund shall be apportioned as provided by law."

The meaning of this is clear and it means that after the state aid given the various counties has been distributed, the remainder of such fund shall be apportioned according to the school census as provided by Sec. 8280, C. L. 1921. In our opinion, the amendment did not change this meaning, but it did render the concluding sentence of the section as amended more or less obscure, and this has given rise to two constructions. The present superintendent of public instruction and her immediate predecessor, as well as this office, have held that the prohibition made by the amendment of 1923 prevents the state superintendent of public instruction from distributing state aid to any county for any school district which has not made a special school tax levy of three mills (now five mills) or more for the same year. Others, including attorneys, have construed the amendment to mean that every school district in which there occurs a deficiency in payment of teachers' salaries, is entitled to state aid, but those districts which have not made a special levy of the required amount may not participate in the apportionment according to census.

In support of the construction given by this office, we are calling your attention to that part of the language reading as follows: "No school district shall share in such *distribution.*" In our opinion, this refers to state aid, and we apprehend that if the word apportionment had been used instead of the word distribution, there would have been more merit in the contention of those who oppose our construction.

In reference to what you refer to as a concrete example of how this law works, you fall into an error in reference to the manner of the distribution of state aid. You are assuming that no school district in any county is entitled to state aid unless every district in the county may share in the distribution. This is not in accordance with the law. The restriction against sharing in the distribution of state aid is directed against *school districts* and not against *counties.* Application for state aid is made by the superintendent of schools of each county. This application is examined by the state superintendent of public instruction,

who has before her all the data necessary, including the amount of the special levy of each district for that year. If one or more districts in that county have not made the required special levy of five mills, she deducts from the amount to be distributed to that county the amount applied for for any district that has not made the special levy, certifies the amount so arrived at to the state auditor, who draws his warrant on the state treasurer in favor of the county treasurer of such county for the amount so certified to be paid out of the public school income fund. The county treasurer and the county superintendent of schools are notified in case state aid is withheld from any particular district, naming it.

Under this procedure, it might happen that as many as one-half of the school districts in a certain county had failed to make the required special levy, and yet the districts which had made the required levy would share in the distribution to that particular county; in other words, it is not necessary that each school district in the county must make the required levy before any state aid can be distributed to that county.

It has been urged that the special levy of five mills in some prosperous districts would raise more money than the district could use, but that in order to obtain state aid, they must make a levy of five mills. The answer to this is that that district has no necessity for applying for state aid inasmuch as a levy of one mill or two mills would raise sufficient funds for all their needs. But the law under discussion was to furnish aid to poor and needy districts, and prosperous districts can get along very readily without the state aid required by the poor districts.

We trust that we have made our position herein clear, but if not, we will be glad to go further into the matter with you.

Yours very truly,

WILLIAM L. BOATRIGHT,
Attorney General.
A. L. BEARDSLEY,
Assistant Attorney General.

But, see Colorado Supreme Court decision to the contrary—No. 12,224, *Washington County High School vs. Board of County Commissioners,* decided December 17, 1928.

497. ELECTIONS

To Mrs. Mary H. Williams, Oct. 30, 1928.

Sec. 7700, C. L. 1921, page 108 of pamphlet Election Laws, provides that where the county commissioners at a regular meeting so determine judges of election shall be paid at the rate of $5.00 per day of twelve hours or fractional part thereof over six

nours for the time actually and necessarily spent in the discharge of election duties, the compensation so received not to exceed $10.00 in any case. This section was enacted in 1911 and is the latest law on this subject. This section also provides that in counties such as Summit county, where the county commissioners have not at a regular meeting elected to pay the compensation above specified, such compensation shall be as provided in Sec. 2227, R. S. 1908. This reference is to Sec. 7701, C. L. 1921, page 109 Election Laws, which provides that each judge and clerk of election shall be allowed $2.50 per day for each day's service as such judge or clerk, and ten cents per mile for the distance necessarily traveled in going to and from the office of the county clerk. Sec. 7703, C. L. 1921, page 109 of Election Laws, provides for the payment of $2.50 per day for delivering the returns and ballot box.

498. TAXATION

The Roselawn Cemetery Association of Pueblo is not so clearly entitled to exemption from general taxation that the Colorado Tax Commission should hold it so exempt.

To Colorado Tax Commission, Nov. 3, 1928.

Gentlemen:

You have submitted to this office the question as to whether the property of The Roselawn Cemetery Association of Pueblo, is exempt from general taxation.

It appears from the recitals set forth in the petition filed with your commission by this association that it was incorporated in October, 1926, under the laws of this state "as a cemetery association operating not for profit;" that the association "purchased from The Pueblo Cemetery Association the cemetery known as Roselawn and issued its bonds in payment therefor and by said purchase became the *beneficiary* of a trust fund designated as The Perpetual Care Fund theretofore created and maintained, and now maintained in the hands of trustees for the perpetual care of said cemetery and the graves therein;" that "all of the income of the Roselawn Cemetery Association is devoted to the maintenance and operating expenses, interest on purchase money bonds and for the retirement of said bonds, and for the maintenance and completion of said Perpetual Care Fund;" that "for governmental and operative purposes only, a limited number of shares of stock in the association have been issued for the reason that the said cemetery has been established for many years and a large number of those who have owned lots are now dead and others have left the vicinity and their addresses are unknown, and it would be impossible to notify or assemble the lot owners for corporate purposes;" that "the shares so issued have no par

value and are plainly marked 'non-participating' and are without market value."

Mr. Leo P. Kelly, an attorney at law, of Pueblo, acting in behalf of School District Number 12 of Pueblo county, has filed with your commission a vigorous protest against the application for exemption, and has set forth that "the new association issued bonds in the amount of $99,300 which is supposed to represent, in the judgment of the promoters of the deal, the value of the unsold lots in the cemetery," and he submits with such protest a copy of the articles of incorporation and by-laws of the new association.

It is provided by the articles that the capital stock of the association "shall consist of sixteen hundred (1,600) shares and said shares shall be without par value. No dividend shall be paid upon said shares of capital stock, and its issuance is for the convenience of the stockholders in levying assessments should it become necessary so to do." The term of existence of the corporation is fixed at twenty years from date of incorporation. The by-laws of the association provide that:

> "The Board of Directors shall at their first meeting in November of each year appropriate to The Perpetual Care Trust and pay to the treasurer of said trust out of available cash all earnings in excess of that required for the operation of the association, the liquidation of its current obligations, and a reasonable reserve for the replacement of lots sold during the last fiscal year, with the exception that until all outstanding bonds have been paid and retired the sum of $10,000.00 per annum shall be appropriated towards the retirement of bonds and payment of accrued interest, and should the earnings and available cash in any year exceed the said sum of $10,000.00, and that required for necessary operating expenses and a reasonable reserve for replacement, then in that event one-half of said excess shall be appropriated to the further and additional retirement of bonds and payment of accrued interest on the same, and the remaining one-half shall be appropriated to The Perpetual Care Trust and paid to the treasurer of said trust for the uses as specified in Section 21."

Section 5 of Article X of the State Constitution provides that "cemeteries not used or held for private or corporate profit, shall be exempt from taxation, unless otherwise provided by general law." And Sec. 7198, C. L. 1921, provides that "cemeteries not held or conducted for private or corporate profit" shall be exempt from general taxation.

But Mr. Kelly contends that this association can not be considered a "not for profit corporation," because, (a) it has capital

stock divided into shares and has stockholders, and (b) because it is organized to exist for twenty years, whereas "a true non-profit cemetery association would be perpetual." He urges that, although the articles provide that no dividends shall be paid upon the stock, upon dissolution "the accumulated profits would be distributed to the shareholders," and that the stockholders are, in effect, "simply allowing dividends to accumulate for twenty years." There is weight in these suggestions, but it must further be considered that the articles expressly declare that the issuance of stock "is for the convenience of the stockholders in levying assessments should it become necessary so to do," and that the by-laws require that all annual earnings in excess of operating expenses "and a reasonable reserve for the replacement of lots sold during the last fiscal year" shall be appropriated to the "perpetual care trust," the funds of which are dedicated to the sole use and benefit of the lot owners, the interest accruing therefrom to be used solely for the purpose of maintaining in good condition the lots sold under the perpetual care agreement. There could, therefore, be no accumulation of profits or earnings to be eventually distributed to the stockholders as a deferred dividend payment.

But the by-laws, as already noted, also provide that out of the annual earnings of the association there shall be set aside "a reasonable reserve for the replacement of lots sold during the last fiscal year." This has the effect of keeping intact the capital estate of the association. And Mr. Kelly urges that the shareholders thus "have an investment which may pay handsomely through increased values during the twenty years of its corporate life." And he points out that "When the charter expires the shareholders are legally entitled to distribution of the assets unless they decided to extend its charter." It may be that at the expiration of the twenty years the lots on hand as the result of the original purchase and of replacements would be of greater value than the lots originally acquired by the new association from the old association. But this is merely a matter of conjecture.

However, the plan of operation of this association contemplates that the income to be derived from the operation of the cemetery shall not only pay for the property originally purchased but shall be adequate to keep the original estate intact at all times. In a word, the new association starts out with nothing, issues its bonds to buy a quantity of real estate, and proceeds to do business with the purpose and plan both of paying for the real estate out of the income derived from sales, from time to time, of parcels of such real estate and of keeping the *quantum* of such real estate at all times intact. When it is considered that the association was organized to exist, not perpetually, but for only twenty years, can it be said that this cemetery is not used or held

for private or corporate profit and is therefore exempt from taxation?

We have thus far assumed the correctness of the statement in the protest of the school district that the new association issued bonds in the amount of $99,300, representing the full value of the unsold lots in the cemetery purchased by it.

We have on file a copy of the letter addressed by the Pueblo Cemetery Association to its stockholders under date of July 27, 1926, setting forth a proposal to organize a new corporation "to operate as a non-profit cemetery corporation" whose stock should "have no par value" and be issued to the stockholders of the new company in proportion to their holdings in the old company, "the present company to dispose of all its assets to the new company for the sum of $105,600 to be paid" $5,600 in cash and $100,000 in "15-year bonds bearing 6 per cent interest, payable semi-annually." Assuming that the new association was organized pursuant to this plan the result, of course, is that it acquired this cemetery for a cash outlay of $5,600 and by the issuance of $100,000 in bonds. And, as already shown, the association, out of its income from the cemetery, plans both to retire these bonds and to keep its capital intact by replacing from time to time all lots sold.

Sec. 2433, C. L. 1921, provides in substance that the net proceeds from the sale of lots by a cemetery corporation "shall not be appropriated to any purpose of profit to the corporation or its members." But Sec. 2437, C. L. 1921, provides that the above section shall not apply to cemetery corporations organized for the purposes of profit. So the question remains, was this cemetery association organized for the purposes of making profits?

There is also a general rule of law that upon the dissolution of "non stock" corporations, especially those that are charitable in character, the real estate of the corporation reverts to the grantor or donor (8 Fletcher Cyc. Corps., p. 9191). But the charitable character of this association is the very question in issue.

It is not the province of your commission to allow or disallow claims of exemption from taxation. Whether or not any particular item of property is exempt from taxation is a question of law to be determined by the courts unless the case is so clear that the taxing authorities feel justified in treating it as exempt. No ruling of your commission or of this department would be binding upon either the local authorities or other taxpayers who may be interested in this question.

It may be that the courts would hold that this cemetery is exempt from general taxation but, in view of the matters pointed out by Mr. Kelly, we cannot say that the matter is so clear that you would be justified in advising the local authorities to treat

this property as exempt. We think the matter should be determined by the courts.

Yours respectfully,

WILLIAM L. BOATRIGHT,
Attorney General.

CHARLES ROACH,
Deputy Attorney General.

499. LAND BOARD

Taxable interest.

The interest or equity of a purchaser of state land, for the purpose of taxation, is the amount paid by him on his contract of purchase with the state.

To St. Bd. Land Commissioners, Nov. 16, 1928.

Gentlemen:

Sec. 1178, C. L. 1921, provides as follows:

> "All lands sold under the provisions of this act, or any interest therein, shall be subject to taxation, and the register of the state board of land commissioners shall furnish to the county assessor of each county on the first day of May of each year a list of the equities owned or acquired in all lands so sold, to whom sold, the price per acre and the amount paid. Each county shall pay the expense incurred in compiling such list."

Sec. 7193, C. L. 1921, also provides in part:

> "That all equities in state and school lands purchased under contract taken from the state, shall, during the life of the contract, be taxed at their full cash value . . ."

The question is now presented as to how the "interest" or "equity" of the purchaser shall be computed for the purpose of taxation.

The weight of authority is to the effect that in the absence of statute, public lands are not taxable until the complete equitable title passes to a purchaser by the performance of his part of the contract.

Henderson vs. State, 53 Ind. 60.

Where there is a statute, however, such lands may be taxed after sold, even before the equitable title passes from the state.

The statutes of some states specifically provide that the interest of the purchaser of state land shall be the amount paid by him, but in this state there is no such provision. However, it is my opinion that as the statute requires the register of the

state land board to furnish to the various county assessors a list of the equities owned or acquired in all lands sold by the state, that it was the intent of the legislature to tax only the interest of the purchaser, based upon the amount paid by him, for in no other way could the register prepare a list of "equities." Also if any other basis were to be used for the computation of taxes, the requirement that the register advise the assessor of the amount paid on any contract would be of no use.

Very truly yours,

WILLIAM L. BOATRIGHT,
Attorney General.
OTTO FRIEDRICHS,
Assistant Attorney General.

See also opinion dated December 4, 1928.

500. INSURANCE COMMISSIONER

To Jackson Cochrane, Nov. 16, 1928.

Under Ch. 135, S. L. 1919, there can be written in Colorado only group life insurance.

This opinion withdrawn December 19, 1928.

501. COAL MINING LAWS

To James Dalrymple, Nov. 16, 1928.

Under Secs. 3508-3513, C. L. 1921, fire bosses are required in all coal mines, regardless of the number of men employed.

INDEX

NOTE—Opinion number follows each lead.

INDEX

A

B