

*Idaho Attorney General's Office*

BIENNIAL REPORT

—OF THE—

ATTORNEY GENERAL

—OF THE—

STATE OF IDAHO.

—FOR THE—

YEARS OF 1897 AND 1898.

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LEWISTON, IDAHO.  
THE MORNING TRIBUNE.  
1898.

STATE OF IDAHO.  
OFFICE OF ATTORNEY GENERAL,

BOISE CITY, IDAHO, December 12, 1896.

*To His Excellency, Frank Steunenberg, Governor  
of the State of Idaho.*

SIR: In compliance with the requirements of Article IV, section 17 of the constitution, and section 250 of the Revised Statutes of the State of Idaho, I have the honor to herewith submit a report of the condition of affairs and official transactions of this department for the years 1897 and 1898, accompanied with a copy of my official docket, which is hereto attached.

During my term of office, the supreme court of the state has decided a number of important civil cases to which the state and various counties were parties, notably: State vs. Fitzpatrick (51 Pac. Rep., 112), which involved the question as to whether the statute relating to usury applied to notes and mortgages taken by the land board upon loans of school moneys made by the state, and which was decided in favor of the state; Pike, Receiver, vs. State Board of Examiners (51 Pac. Rep., 614), where it was unsuccessfully sought to compel the board to allow and pay certain claims against the state; Cohn vs. Kingsley (49 Pac. Rep., 985), where an act entitled "An Act Regulating the Fees and Compensations of the Various County and Precinct Officers within the State of Idaho," approved March 12th, 1897, was decided invalid on the ground that the provisions of the constitution were not complied with in its enactment and passage, or rather that the journals of the two houses of the legislature failed to show that the requirements of

the constitution were obeyed in its enactment; and *Kingsbury vs. Auditor Anderson* (51 Pac. Rep., 744). In the case last above referred to, Mr. Kingsbury had been employed by the state auditor to prosecute a civil action for and on behalf of the state against I. C. Hattabaugh, ex-county treasurer of Latah county, and his bondsmen for certain moneys due the state. The employment was made under the provisions of section 1685 of the revised statutes, which reads as follows:

"The comptroller or attorney general may employ other counsel than the district attorney, and the expenses must be paid out of the territorial treasury."

No appropriation had been made for the payment of attorney's fees in such cases, but plaintiff contended that said section 1685 authorized the state auditor to draw a warrant on the general fund for the amount of his claim, which had been previously passed upon and allowed by the state board of examiners, and upon the refusal of the auditor to do so mandamus proceedings were instituted against him. The court held that plaintiff was not entitled to the writ.

Ten important criminal cases have been heard and decided by the supreme court during the past two years. The judgment in seven affirmed, and in three reversed. In two of them the death penalty was imposed and executed.

Shortly after assuming the duties of this office, I instituted twelve different actions to recover principal and interest overdue on certain notes and mortgages held by the state for loans of school money made at different times by the predecessors of the present state board of land commissioners, and aggregating many thousands

of dollars. One of these cases was prosecuted to judgment in the district court held in and for Ada county, and by the state appealed to the supreme court. I refer to the case of State vs. Fitzpatrick, above mentioned. While every feature of the case was decided in favor of the state, the court held it to be the duty of district attorneys to prosecute such cases, and that the law did not authorize the attorney general to employ counsel to prosecute that particular class of cases. The eleven cases remaining untried were then placed in charge and control of the district attorneys of the various judicial districts in which the suits were instituted, and where they are still pending, undetermined and unheard.

These cases are not set out or mentioned in the copy of the attorney general's docket, which is hereto attached, but were entered and appear upon said docket. In this connection I desire to impress upon you the wisdom, importance and necessity for an amendment to the act relating to and defining the powers and duties of the state board of land commissioners, granting to and enjoining upon the board, or the secretary thereof, full and complete power, authority and duty to superintend and control the collecting of all school moneys loaned or invested by the board. And the secretary of the board should be authorized to appoint and employ counsel when necessary and when the press of other business prevents his attending in person to suits brought for the recovery of such funds.

Every dollar of school money passes through the hands of the secretary; he is custodian of all notes and mortgages received as security for funds loaned by the board, and is liable and responsible upon his official bond for the safe keep-

ing of the same, and therefore should have the direct management and control of all suits or actions brought in connection therewith.

There is another matter which should not escape the attention of our legislature, viz: the duties to be assigned prosecuting attorneys of the various counties. The prosecuting attorney is a very important adjunct to the attorney general, and it is very necessary that perfect harmony and understanding should exist between them. Quite frequently the validity and constitutionality of statutes are questioned in proceedings instituted in the district courts of the state in which the state or county is a party or greatly interested; and no less frequently are these questions decided adversely to the state or county, and the time for appeal has elapsed before the attorney general is apprised of them. I would therefore recommend that prosecuting attorneys be required to make monthly and quarterly reports to the attorney general of all business of a public nature, giving in detail the character of any and all actions and proceedings, both civil and criminal, brought by or against the state or a county. Such reports should contain mention of every step and stage in said actions and proceedings.

There are now pending before the honorable commissioner of the general land office at Washington, D. C., nineteen contest cases involving the state's right and title in and to certain white pine lands situate in Latah and Shoshone counties, and heretofore selected by the state for its various educational, penal and reformatory institutions. These contests were initiated in the local land office at Lewiston, Idaho, by homestead and other claimants, where they were

heard and decided against the state.

The secretary of the land board, under authority conferred upon him by section 29 of an act relating to the state board of land commissioners, approved March 6, 1893, employed Hon. B. F. Morris and S. L. McFarland to represent the state in said cases before the Lewiston land office, which they did, and prepared and perfected appeals from the decisions of the register and receiver to the honorable commissioner of the general land office.

While the law does not compel the attorney general to act as the legal adviser of the numerous county and precinct officers, he is called upon daily by them for opinions. Often the questions submitted are new and involve the construction of contradictory statutes and obscure provisions of the state constitution which have never occupied the attention of the court. During my term of office I have rendered a great number of opinions for state, county and precinct officers upon such questions, and fortunately for the public only one has been held erroneous by the supreme court. I refer to an opinion given to State Treasurer Storer, and upon which he refused to make a transfer of the capitol building fund to the general fund, as he was thereafter required by the supreme court to do in the case of Steunenberg vs. Storer (52 Pac. Rep., 14).

Owing to the rule announced by the supreme court in Cohn vs. Kingsley (49 Pac. Rep., 985), the validity of the greater portion of our laws passed subsequent to the adoption of the constitution is doubtful, and the coming legislature will doubtless be called upon to make a thorough investigation of all the session laws from the adoption of the constitution to the present time for

the purpose of ascertaining those that were not enacted in accordance with the requirements of the constitution, and if possible curing such objection. I have made a careful search into both house and senate journals of the first, second, third and fourth sessions of the state legislature, with a view of ascertaining the condition of some of the most important acts with regard to the manner of their passage and of presenting in this report a list of those which, in my opinion, are open to the same objections urged against the "Fee Bill", in order to more particularly impress upon the legislature the importance of such an investigation and to facilitate the same. In following out this plan I did not attempt to make a complete list of all laws which I consider come under the ban announced in *Cohn vs. Kingley*, *supra*, for I am satisfied that the legislature will not content itself with my report of the journals, but will investigate for itself, the list prepared by me serving as a stimulus.

I have also examined the titles of all the laws passed since statehood and find many of them fatally imperfect.

Section 16 of Article III of the constitution reads as follows: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title".

Section 18 of Article III of the constitution is as follows: "No act shall be revised or amended by mere reference to its title, but the section as

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amended shall be set forth and published at full length".

Writers upon statutory and constitutional law hold that it is not enough to refer to the original act merely by the number of the chapter of published laws which includes it, but that the true and actual subject must be expressed in the title, and not by way of reference to something else to show it.

The various legislatures of the state of Idaho have evidently paid very little attention to the requirements of said sections 16 and 18 of Article III of the constitution in framing titles to the session laws, for an examination of the session acts will show that it was often sought to amend an act by mere reference to a "chapter" or to a "subdivision of a section" without even expressing the subject of the "chapter or subdivision" intended to be amended in the title to the amendatory act.

In my opinion the following acts are invalid for the reason that the provisions of the constitution were not complied with in their enactment, to-wit:

"An Act Establishing the Soldiers' Home", laws 1893, page 91; senate journal, second session, page 56.

"An Act Defining the Crime of Rape", laws 1793, page 10; senate journal, second session, page 56.

"An Act Relating to the Powers and Duties of Boards of County Commissioners Over Highways, etc.", laws 1893, page 184; house journal, second session, page 45.

"An Act Creating Fremont County, and Defining the Boundaries of Bingham County", laws



1893, page 94; house journal, second session, page 45. .

"An Act Creating Bannock County, etc.", laws 1893, page 170; house journal, second session, page 45.

"An Act Establishing the State Normal School at Lewiston", laws 1893, page 6; senate journal, second session, pages 50, 60, 64, 66, 71 and 72. This act (house bill No. 14) was substituted for senate bill No. 23, and was never read in the senate the second time, either by title or at length.

"An Act Relating to the State Board of Land Commissioners, and Providing for the Selection, Location, Sale and Rental of State Lands, etc.". laws 1893, page 139; house journal, second session, pages 96, 101, 74, 75, 132, 138, 158, 170, 171, 175, 277, 286; senate journal, second session, pages 162, 177, 183, 228, 247, and 263.

"An Act Affecting Highways", laws 1895, page 143, house journal, third session, page 269.

"An Act Annexing a Part of Blaine County to Custer", laws 1895, page 140; house journal, third session, page 265.

Irrigation act, laws 1895, page 174; house journal, third session, page 235.

Apportionment of old Alturas county debt, laws of 1895, page 87; house journal, second session, page 225.

Apportionment of licenses, laws 1895, page 90; house journal, page 225.

House joint resolution to submit amendment to the constitution with reference to the probate judge, laws 1895, page 237; house journal, third session, page 225.

Abolishing Alturas and Logan counties and

creating Blaine county, laws 1895, page 31; house journal, third session, page 219.

Creating Lincoln county, laws 1895, page 170; house journal, page 219.

To provide for the issuance of municipal bonds, laws 1895, page 70; house journal, third session, page 219.

Attachment law, laws of 1895, page 75; house journal, page 219.

Revenue bill, laws 1895, page 101; house journal, third session, page 208.

Annexing a part of Lemhi to Fremont county, laws 1895, page 145; house journal, third session, page 208.

Providing for appeals from commissioners, laws 1895, page 50; house journal, third session, page 209.

Requiring prisoners to labor, laws 1895, page 100; house journal, third session, page 199.

Election laws, laws of 1895, page 90; house journal third session, page 201.

Appeals to supreme court, laws of 1895, page 142, house journal, third session, page 201.

Separate road districts, laws of 1895, page 132; house journal, third session, page 201.

Endorsement of complaints, laws of 1895, page 139; house journal, third session, page 201.

Insolvency proceedings, laws of 1895, page 76; house journal, third session, page 201.

Apportionment of licenses, laws 1895, page 37; house journal, third session, page 192.

Regulating marriage, laws of 1895, page 166; house journal, third session, page 192.

State land board, duties of, laws of 1895, page 83; house journal, third session, page 193.

Repealing state boiler inspector, laws of 1895, page 157; house journal, third session, page 185.

Charge to pensioners, laws of 1895, page 36; house journal, third session, page 179.

Bonds for insane asylum, laws of 1895, page 148; house journal, third session, page 183.

Relieving purchasers of state lands, laws of 1895; page 38; house journal, third session, page 166.

Public schools and education, laws of 1895, page 156; house journal, third session, page 166.

Incorporating churches, laws of 1895, page 24; house journal, third session, page 160.

Appropriation for state government, laws of 1895, page 133; house journal, third session, page 142.

Fish and game law, laws of 1895, page 152; house journal, third session, page 137.

Redemption from execution and sale, laws of 1895, page 34; house journal, third session, page 34.

Forbidding the employment of aliens, laws of 1897, page 5, house journal; fourth session, page 90.

Chattel mortgage on growing crops, laws of 1897, page 6; house journal, fourth session, page 34.

Soldiers' home, laws of 1897, page 7, house journal, fourth session, page 56.

Homesteads, laws of 1897, page 10; house journal, fourth session, page 38.

Free school system, laws of 1897, page 11; house journal, fourth session, page 55.

Location of placer claims, laws of 1897, page 13; house journal, fourth session, page 34.

Service upon corporations, laws of 1897, page 13; house journal, fourth session, page 34.

Absence of county officers, laws of 1897, page 15, house journal, fourth session, page 168.

State engineer, laws of 1897, page 15; house journal, fourth session, page 126.

Payment for opals, laws of 1897, page 16; house journal, fourth session, page 153.

Suppression of immorality, laws of 1897, page 18; house journal, fourth session, page 85.

Duties of county surveyors, laws of 1897, page 19; house journal, fourth session, page 85.

Pasturing live stock and taxation, laws of 1897, page 22; house journal, fourth session, page 106.

Duties of superintendent of public schools, laws of 1897, page 25; house journal, fourth session, page 162.

Conveying prisoners to penitentiary, laws of 1897, page 26; house journal, fourth session, page 168.

School text-books, laws of 1897, page 28; house journal, fourth session, page 153.

Amending election laws, laws of 1897, page 29; house journal, fourth session, page 168.

Revenue and taxation, laws of 1897, page 30; house journal, fourth session, page 56.

Government of cities, towns, etc., laws of 1897; page 34, house journal, fourth session, page 126.

Albion normal school trustees, laws of 1897, page 42; house journal, fourth session, page 85.

Incorporating Cœur d'Alene City, laws of 1897, page 44; house journal, fourth session, page 153.

Assessment in cities, towns, villages, laws of 1897, page 50; house journal, fourth session, page 93.

Support of poor by members of family, laws of 1897, page 52; house journal, fourth session, page 34.

Water, irrigation, domestic use, laws of 1897, page 52; house journal, fourth session, page 106.

Attorneys, admission of, laws of 1897, page 53; house journal, fourth session, page 68.

To prohibit gambling, laws of 1897, page 53; house journal, fourth session, page 106.

Guardians, laws of 1897, page 55; house journal, fourth session, page 34.

Cause of suspending attorneys, laws 1897, page 55; house journal, fourth session, page 34.

Distribution of water, laws of 1897, page 56; house journal, fourth session, page 115.

Parole of convicts, laws of 1897, page 59; house journal, fourth session, page 186.

Fees of county officers, laws of 1897, page 61; house journal, fourth session, page 186.

Powers and duties of county attorney, laws of 1897, page 74, house journal, fourth session, page 55.

Election of road overseers, laws of 1897, page 78; house journal, fourth session, page 46.

Powers and duties of county superintendent of public instruction, laws of 1897, page 79; house journal, fourth session, page 106.

Government of the city of Boise, laws of 1897, page 85; house journal, fourth session, page 115.

Abstracts of title, laws of 1897, page 92; house journal, fourth session page 85.

Assessment and taxes, laws of 1897, page 94; house journal, fourth session, page 56.

Legal rate of interest, laws of 1897, page 95, house journal, fourth session, page 153.

Independent school districts, laws of 1897, page 96, house journal, fourth session, page 85.

Medical and surgery bill, laws of 1897, page 97; house journal, fourth session, page 220.

State board of horticulture, laws of 1897, page 109; house journal, fourth session, page 220.

Compensate Mrs. Broadhead, laws of 1897, page 122; house journal, fourth session, page 139.

Discharge of insolvent debtors, laws of 1897, page 122, house journal, fourth session, page 106.

Label and trade mark, laws of 1897, page 123, house journal, fourth session, page 55.

Water rental and sale, laws of 1897, page 127; house journal, fourth session, page 68.

Vacating First street, Boise, laws 1897, page 137; house journal, fourth session, 153.

Suspending delinquent taxes, laws of 1897, page 140, house journal, fourth session, page 168.

State board of arbitration, laws of 1897, page 141; house journal, fourth session, page 55.

Irrigation bill, laws of 1897, page 146, house journal, fourth session, page 87.

At this time it may be advisable to suggest that if the secretary of state, in printing the laws hereafter, will designate each and every act or bill by the number given it by the branch of the legislature where it originated, it will greatly aid those who have occasion to examine into the journals to ascertain the manner in which any law was enacted.

The following laws are defective, if not inoperative, on account of imperfect titles, to-wit:

#### ACTS OF 1891.

Page 10, act of January 14, 1891, amending section 196, relating to fees and commissions.

Page 11, act of January 15, 1891, amending section 172, relating to trustees of capitol building grounds.

Page 21, act of January 30, 1891, amending section 326, relating to state and district officers.

Page 31, act of February 21, 1891, amending section 1760, relating to county commissioners.

#### ACTS OF 1893.

Page 10, act of January 31, 1893, amending section 6765, defining rape.

Page 13, act of February 2, 1893, amending section 7400, relating to resistance of execution of process.

Page 20, act of February 13, 1893, amending section 8151, relating to witnesses in criminal cases.

Page 22, act of February 16, 1893, amending section 6830, etc., relating to opium smoking.

Page 65, act of February 27, 1893, amending section 1760, relating to bounty on scalps of wild animals.

Page 67, act of February 27, 1893, amending section 3445, relating to special liens.

Page 150, act of March 6, 1893, amending section 1401, relating to exemption from taxation.

Page 163, act of March 6, 1893, amending section 6850, relating to gambling.

Page 168, act of March 6, 1893, amending section 288, relating to interest on state warrants.

#### ACTS OF 1895.

Page 13, act of February 5, 1895, amending section 2010, relating to reports of county auditors and treasurers.

Page 19, act of February 19, 1895, amending section 6765, relating to the crime of rape.

Page 34, act of March 5, 1895, amending section 4492, etc., relating to the redemption of property sold under execution.

Page 40, act of March 5, 1895, amending section

4482, relating to notice of sale under execution.

Page 47, act of March 6, 1895, amending section 1404, relating to exemption from taxation.

Page 50, act of March 6, 1895, amending section 1776; etc., relating to appeals from order of county commissioners.

Page 56, act of March 8, 1895, amending chapter 6, title 13, relating to funding county indebtedness.

Page 75, act of March 9, 1895, amending section 4304, relating to attachments.

Page 85, act of March 9, 1895, amending section 4480, relating to exemption from execution.

Page 132, act of March 9, 1895, amending section 887, relating to road districts in towns and cities.

Page 139, act of March 11, 1895, amending section 4139, relating to complaints and summons in civil cases.

Page 139, act of March 9, 1895, amending section 355, relating to oath of office of county commissioners.

Page 142, act of March 9, 1895, amending section 4807, relating to appeals from district courts to supreme courts.

#### ACTS OF 1897.

Page 9, act of March 2, 1897, repealing subdivision 2 of section 1645, relating to licenses on theatres.

Page 10, act of March 2, 1897, amending section 1453, relating to assessments of property for taxation.

Page 13, act of March 3, 1897, amending section 4144, relating to service of summons on corporations.



Page 15, act of March 3, 1897, amending section 1826, relating to absence of county officers.

Page 52, act of March 8, 1897, amending section 2531, relating to domestic relations.

Page 55, act of March 8, 1897, amending section 5774, relating to guardianship of minors.

Page 73, act of March 12, 1897, amending section 8074, relating to reversals of judgments in criminal cases.

Page 76, act of March 12, 1897, amending section 1365, relating to sale of estrays.

Page 122, act of March 12, 1897, amending section 5914, relating to insolvent debtors.

Before closing this report, I desire to call your attention to the fact that there are only two volumes of the published reports of our supreme court decisions. Every other state or territory in the union, with the exception of Indian territory, has its supreme court decisions published up to date. All the opinions of our supreme court, rendered subsequent to the November term thereof, 1892, can be found only by a search through the numerous volumes of the Pacific Reporter. This does not speak very well for the state, especially when we consider that the supreme court reports of New Mexico, Arizona, and Oklahoma are published up to date.

Respectfully submitted,

R. E. McFARLAND,  
*Attorney General.*

# **COPY OF ATTORNEY GENERAL'S DOCKET.**

Winters, Parsons and Boomer vs. State of Idaho.

Action brought in the supreme court for work done on the state wagon road. . . . .  
Recommendatory judgment rendered in favor of plaintiffs. Judgment not satisfied.

State vs. Matt Crump.

Murder. Appealed from Washington county.  
Judgment reversed.

State vs. Frank Smith.

Murder. Appealed from Latah county. Judgment affirmed. Convict serving life sentence.

State vs. Harry Gordon.

Murder. Appealed from Latah county. Judgment affirmed. Convict serving life sentence.

State of Idaho vs. Sid Larkin.

Murder. Appealed from Bingham county.  
Judgment affirmed. Death penalty imposed and executed.

In re John Ridenbaugh.

Petition for a writ of habeas corpus. Petition denied.

State of Idaho vs. Edgar Ferris.

Grand larceny. Appealed from Ada county.  
Judgment reversed.

James and Thomas Jolly vs. Latah County.

Action on contract. Appealed by plaintiffs from Latah county. Judgment affirmed.

Dunbar vs. Board of Commissioners of Canyon County.

Involving the validity of bond issue. Appealed from Canyon county by plaintiff. Judgment reversed.

**John J. Blake vs. Board of Commissioners of Ada County.**

Petition for a writ of mandate for a certificate of election to the office of superintendent of public instruction. Granted.

**James Woodworth vs. Board of County Commissioners of Idaho County.**

Appealed from order of board allowing deputy clerk hire. Appealed from Idaho county. Judgment reversed.

**Fanny Cohn vs. Charles S. Kingsley.**

Agreed case involving validity of "Fee Bill". Appealed from Ada county by plaintiff. Judgment affirmed.

**State of Idaho vs. James Duckworth.**

Violation of the quarantine law. Appealed by defendant from Oneida county. Judgment reversed.

**Pyke, Receiver, vs. State Board of Examiners.**

Petition for mandate to compel board to allow claim of Bunting & Co., merchants. Appealed by state from Bingham county. Judgment reversed.

**Wisconsin M. & F. Insurance Company vs. State of Idaho.**

Action on account. No defense. Recommendationary judgment entered.

**State of Idaho vs. Stevenson.**

Action to escheat certain real estate. Appealed from Ada county by defendant. Still pending.

**State of Idaho vs. Charles Bunting et al.**

Action on ex-treasurer's official bond. Pending in district court in and for Ada county.

**State of Idaho vs. Fitzpatrick.**

Action to foreclose mortgage. Appealed from Ada county by plaintiff. Judgment reversed.

Edward C. Brown vs. Board of Medical Examiners. Petition for a writ of mandate. Denied.  
Layfayette Inman vs. State Board of Medical Examiners.

Petition for a writ of mandate. Denied.

State of Idaho vs. John Ridenbaugh

Violation of anti-gambling act. Appealed from Ada county by state. Appeal dismissed.

A. B. Crocheron vs. Board of Commissioners of Owyee County.

Agreed case involving validity of the bond issue of Owyee county. Appealed by defendants. Pending.

State of Idaho vs. John Hines.

Grand larceny. Appealed from Ada county by defendant. Judgment affirmed.

S. B. Kingsbury vs. J. H. Anderson, State Auditor.

Application for mandamus to compel defendant to draw warrant against the state. Writ denied.

State of Idaho vs. Herman St. Clair.

Murder. Appealed from Boise county by defendant. Judgment affirmed. Death penalty imposed and executed.

State vs. Anthony.

Rape. Appealed from Cassia county by defendant. Pending.

State of Idaho vs. Jack Davis.

Murder in the first degree. Appealed from Cassia county by defendant. Judgment affirmed. Death penalty imposed and respite granted by the board of pardons until February 1, 1899.

**W. H. Taylor vs. Canyon County.**

Action on account. Appealed from Canyon county by defendant. Pending.

**State of Idaho vs. McGraw.**

Rape. Appealed from Latah county by defendant. Pending.

**In re Moragne.**

Application for writ of habeas corpus. Writ granted.

**Fairchild vs. Ada County.**

Action for expert witness fees. Appealed from Ada county by plaintiff. Case argued. Pending.

**State of Idaho vs. Baker.**

Rape. Appealed from Ada county by defendant. Pending.

**State of Idaho vs. Thum, Receiver.**

Petition in intervention for order declaring money in the hands of receiver. Trust fund to be paid to the state. Appealed from Bingham county by plaintiff. Pending.

**County of Bingham vs. Woodin et al.**

Action on county treasurer's official bond. Appealed from Bingham county by defendant. Judgment reversed.

**State of Idaho vs. Webb.**

Robbery. Appealed from Shoshone county by defendant. Pending.