subject to the jurisdiction of The Public Service Commission of Indiana, pursuant to the provisions of The Motor Vehicle Act.

OFFICIAL OPINION NO. 31

August 5, 1957

Mr. T. M. Hindman
State Examiner
State Board of Accounts
304 State House
Indianapolis, Indiana

Dear Mr. Hindman:

This is in reply to your request for an Official Opinion on the following questions:

"PART I

"As a result of the Supreme Court decision in the case of Caesar v. Devault, Township Trustee of Calumet Township, etc., *et al.*, number 24910, April 3, 1957, your official opinion is requested upon the questions:

"(1) Is the appellant Caesar entitled to her salary at the rate of $4,200.00 annually as provided by Chapter 154, Acts 1953, being Burns' Indiana Statutes, section 5-108m, 1955 Pocket Supplement, from the time her appointment was declared null and void by the Porter Circuit Court?

"(2) Does the decision prohibit the payment of constable's salary and other office expense provided for in Chapter 223, Acts 1945, sections 2 and 4, being Burns' Indiana Statutes, section 5-108c, 5-108e, 1955 Pocket Supplement:

"(a) on and after April 23, 1957, the date of finality of the decision?

"(b) If the answer to (a) is in the affirmative, are such payments made prior to the decision invalid from the effective date of Chapter 223, Acts 1945?

"PART II

"The city of Gary, located in Calumet Township, Lake County, Indiana, appropriated funds for a special census of said city. The special census was conducted by the Federal Bureau of the Census. The result was certified to the Auditor of State on November 8, 1956, as follows:

> " 'I hereby certify, That according to the official count of the returns of the Special Census taken as of August 18, 1956, the population of the city of Gary, County of Lake, State of Indiana, was 168,884.
>
> Robert W. Burgess
> Director, Bureau of
> the Census'

"The population of the city of Gary, according to the last preceding United States decennial census of 1950, was 133,911.

"Chapter 154, Acts 1953, being Burns' Indiana Statutes, section 5-108m, *et seq.*, 1955 Pocket Supplement, applies to justices of the peace in townships wherein are located cities of the second class 'said cities having a population of not less than 64,000 nor more than 150,000 according to the last preceding United States Census.' Among other things, the said act provides a salary of $4,200.00 annually for justices of the peace of such townships, fixes a docket fee, provides for clerk hire and establishes jurisdiction.

"Your official opinion is requested upon the questions:

> "(1) Is the special census as of August 18, 1956, declaring the population of the city of Gary to be 168,884 considered the last preceding United States census for such city?
>
> "(2) If the answer is in the affirmative, are such justices of the peace of Calumet Township entitled to continue to receive an annual salary of $4,200.00?

"(3) If the answer to question (2) is in the negative, under which statute will such justices of the peace operate as to:

"(a) salary,

"(b) docket fee and other costs to be taxed, charged and collected,

"(c) clerk hire and jurisdiction?"

Inasmuch as your questions are in two parts, I shall endeavor to answer them in the same manner.

PART I

Your first question concerns whether the Justice of the Peace is entitled to her salary at the rate of $4,200.00 per year as provided in Acts of 1953, Ch. 154, Sec. 1, as found in Burns' (1955 Supp.), Section 5-108m, from the time her appointment was declared null and void by the Porter Circuit Court. This question assumes that, if she were entitled to receive such salary, it would be at the rate of $4,200.00 per year, pursuant to the Acts of 1953, *supra*. Since the amount of salary is effected by the special census about which you inquire in Part II of your letter, I shall reserve answering the question as to the amount of salary to which she is entitled until I consider the points you raise concerning the effect of the special census.

In regard to whether the Justice of the Peace was entitled to receive her salary from the time her appointment was declared null and void by the Porter Circuit Court, said judgment was reversed by our Supreme Court in Caesar v. Devault *et al.* (1957), — Ind. —, 141 N. E. (2d) 338, and the Court, at page 343, said in conclusion:

> "The cause below having been tried entirely upon an undisputed stipulation of facts, the judgment is reversed with direction to enter finding and judgment for appellant."

As to the effect of a reversal of a lower court's decision by an appellate tribunal, our Supreme Court has said in Doughty *et al.* v. State Department of Public Welfare, County Department of Public Welfare of Madison County (1954), 233 Ind. 475, 121 N. E. (2d) 645:

> "* * * If the appellate tribunal finds the judgment was erroneous and reverses it, such judgment is forthwith vacated and set aside and no longer remains in existence. The parties are then restored to the position they held before the judgment was pronounced and must take their places in the trial court at the point where the error occurred, and proceed to a decision. See discussions, 3 Am. Jur., Appeal and Error, pp. 690, 697, 698."

Based on the above, it is my opinion that the parties in Caesar v. Devault *et al., supra,* were restored to the position they held before judgment in the Porter Circuit Court, and said judgment then being entered for the appellant Caesar pursuant to the Supreme Court's decision, she is entitled to her salary from the date of her appointment, which, of course, would include the time after her appointment was declared null and void by the Porter Circuit Court.

Your second question is whether the decision in Caesar v. Devault *et al., supra,* prohibits the payment of constables' salaries and other office expense as provided in Acts of 1945, Ch. 223, Secs. 2 and 4, as amended by Acts of 1949, Ch. 178, Secs. 2 and 4, as found in Burns' (1955 Supp.), Sections 5-108c and 5-108e from April 23, 1957, the date of said decision.

The Acts of 1945, Ch. 223, Sec. 1, as amended by Acts of 1949, Ch. 178, Sec. 1, as found in Burns' (1955 Supp.), Section 5-108b, created a separate classification for certain townships which contained two or more cities of the second class, and the greater portion of a city of such class having a population of 110,000 to 115,000, and further provided that there shall be one Justice of the Peace and one Constable in each of such townships.

Section 2 of the above act provided for the salaries of such Justices of the Peace and Constable; Sec. 3, a docket fee; Sec. 4, office rent, clerical help and miscellaneous expenses. In Caesar v. Devault *et al., supra,* Sec. 1 of the statute was declared unconstitutional. Therefore, Secs. 2, 3 and 4 must also fall as they are dependent upon the validity of Sec. 1.

> "* * * The test is whether or not the Legislature would have passed the statute had it been presented with the invalid features removed.

> "Conversely, where the valid parts of an act are not independent, and may not be said to form a complete act separate from the invalid parts, the act must fall as a whole."
>
> Sutherland, Statutory Construction, 3rd Ed., Vol. 2, Sec. 2404, p. 178.

It is settled in this State that an officer is entitled to only such compensation as is provided by statute.

> Applegate, County Auditor v. State *ex rel.* Pettijohn (1933), 205 Ind. 122, 185 N. E. 911;
>
> City of East Chicago, Indiana v. Seuberli (1940), 108 Ind. App. 581, 31 N. E. (2d) 71.

Therefore, after the date of the decision of Caesar v. Devault *et al., supra,* which was April 23, 1957, the Constable is not entitled to the salary provided in the Acts of 1945, Ch. 223, *supra,* nor shall office expense be paid pursuant to that act as said act is null and void.

However, part (b) of your second question poses a more serious question, it being whether payments made prior to the decision are invalid from the effective date of the Acts of 1945, Ch. 223, *supra.*

I have examined the decisions of our courts and find no case directly in point as to whether payments made to an officer under a statute are invalid because of a subsequent decision by the Supreme Court that said statute was unconstitutional. However, I find an interesting decision in point in the recent case of Wichita County, Texas v. Robinson (1954), — Tex. —, 276 S. W. (2d) 509. In that case the Court said:

> "* * * In the early case of Sessums v. Botts, 34 Tex. 335, cited with approval in Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. 2d 1007-1024, 96 A. L. R. 802, the court in discussing the effect of a statute held to be unconstitutional says in substance that a citizen, choosing to disregard a law under the belief that it is unconstitutional, does so at his peril; that it is the better policy to obey the law until its constitutionality has been determined; that this being the duty of the

citizen he should then be protected in that obedience. The court further refuses to approve of the right of the ministerial officer to pass upon the constitutionality of a legislative act, and expressly holds that it is the duty of the officer to execute and not to pass judgment upon the law. While as a general rule a law held unconstitutional is void from the beginning and was never valid and enforceable at any time, nevertheless those obeying the law before its invalidity was determined are not to be punished, but on the contrary their rights are to be protected. To the same effect is the more recent opinion in Sharber v. Florence, 131 Tex. 341, 115 S. W. 2d 604.

"In Robert v. Roane County, 160 Tenn. 109, 23 S. W. 2d 239, where the county sought recovery from the sheriff of salary payments paid under an act later held to be unconstitutional, recovery was denied upon the theory that while an unconstitutional statute does not confer any rights, duties or obligations and is in legal contemplation inoperative *ab initio* nonetheless the parties may so deal with each other relying upon the validity of the statute that neither may invoke the aid of the courts to undo what they have done.

* * *

"The rule that unconstitutional law is a nullity is not applied to work hardship and impose liability on a public official who in performance of duty has acted in good faith relying on the validity of a statute before it has been declared invalid. 16 C. J. S., Constitutional Law, § 101c; Golden v. Thompson, 194 Miss. 241, 11 So. 2d 906; O'Shields v. Caldwell, 207 S. C. 194, 35 S. E. 2d 184; Allen v. Holbrook, 103 Utah 319, 135 P. 2d 242.

"Equitable rights may be acquired though the statute is thereafter declared unconstitutional."

Therefore it is my opinion that payments made pursuant to the Acts of 1945, *supra,* and prior to the decision in Caesar v. Devault *et al., supra,* declaring said act unconstitutional, are not invalid inasmuch as they do not create any liability upon

either the officer making said payments or the officer or persons receiving said payments.

PART II

Your question 1 of Part II is whether the special census of the City of Gary of August 18, 1956, conducted by the Federal Bureau of the Census and certified to the Auditor on November 8, 1956, as an official census by Robert W. Burgess, Director, Bureau of the Census, is to be considered as the last preceding United States census for that City. This question is raised because the above census revealed that the City of Gary now has a population of 168,884. Previously, the Justices of the Peace in the township in which the City of Gary is located came within the provisions of the Acts of 1953, Ch. 154, Secs. 1 through 4, as found in Burns' (1955 Supp.), Sections 108m through 108p, inclusive. The provisions of this act are restricted to townships containing a city of the second class, or a greater portion of a city of the second class, which has a population of not less than 64,000, nor more than 150,000, "according to the last preceding United States census."

The above-quoted words were defined in City of Indianapolis v. Navin (1898), 151 Ind. 139, 47 N. E. 525, as follows:

> "* * * Such words in a statute *refer to the census last taken,* whether before or after the passage of an act, unless the contrary appears in the act itself. So that, although a city or town may not have the required population when the act was passed, *yet at any time in the future when any census taken after the passage of the act shows that the necessary population has been acquired, such city is governed by the provision of the act;* that is, when a statute provides that all cities or towns of a named population 'according to the United States census' or 'according to the last preceding United States census,' shall be governed by the provisions of the act, then all cities or towns, as they acquire the requisite population as shown by any census thereafter taken, will be governed by the act, the same as if they had the required population as shown by the last preceding census when the law was enacted. * * *" (Our emphasis)

Therefore, it is my opinion that the words "according to the last preceding United States census" in Acts of 1953, *supra,* refer to any official United States census, and the special census of the City of Gary, effective August 18, 1956, must be considered as the last preceding United States census of that City.

Your question number 2 asks whether the Justices of the Peace of Calumet Township are entitled to continue to receive an annual salary of $4,200.00 after August 18, 1956, pursuant to Acts of 1953, *supra.* Said act provides for such a salary for Justices of the Peace in a township wherein is located a city of the second class, or the greater portion thereof, said city having a population of not less than 64,000, nor more than 150,000, according to the last preceding United States census. The City of Gary has a population in excess of 150,000, and it would appear that the Justices of the Peace of Calumet Township would not come within the salary provisions of said act. In that case, the statute which would provide a salary for said Justices of the Peace is Acts of 1927, Ch. 155, Sec. 1, as found in Burns' (1946 Repl.), Section 5-104, which provides for a salary of $1,800.00 for Justices of the Peace in a township wherein is located a city, or the greater portion thereof, of the second class having a population of not less than 55,000 nor more than 300,000 and in which city there exists a city court. Thus it appears that, due to an increase in population, the salary of the Justices of the Peace in Calumet Township would be reduced from $4,200.00 to $1,800.00.

In 1952 O. A. G., Nos. 1 and 34, this office examined questions which also concerned the reduction in salary of public officials due to an increase in population of their particular political subdivision. Both Opinions refer to Acts of 1920 (Spec. Sess.), Ch. 28, Sec. 1, as found in Burns' (1951 Repl.), Section 49-1101, and which reads as follows:

> "The salaries, compensation or per diem of public officials or other persons receiving compensation out of the treasury of any county, township, city, town, or other political subdivision of the state shall in no case be decreased or diminished by reason of any increase or decrease in the population of any such county, township, city, town or other political subdivision, as announced by the census bureau of the United States

government, or by reason of the provisions of any law now in force prescribing and fixing any such salary, compensation or per diem on the basis of population. But, unless otherwise provided by law enacted at this, the second special session of the seventy-first general assembly, or hereafter enacted, such salaries, compensation or per diem shall remain as heretofore fixed by law and as they would have been if no census had been taken: Provided, That nothing in this act shall be construed to prevent the increase of such salary, compensation or per diem by reason of the provisions of any law now in force prescribing and fixing any such salary, compensation or per diem on the basis of population."

The question in Opinion No. 1 concerned the salaries of county commissioners in Lake County, which salaries apparently were decreased due to an increase in the population as shown by the 1950 census. That Opinion, in applying Acts of 1920, *supra,* to its factual situation, concluded as follows:

"The effect of the above statute would seem to continue in effect the salary of incumbents in office whose salaries would be decreased by virtue of the removal of officials of Lake County from the purview of Chapter 236 of the Acts of 1949.

"While some concern exists as to the constitutionality of such a statute preventing decrease in salary, it has been on the statute books for some 31 years without, so far as I can ascertain, ever having been questioned or tested by judicial process.

"It has been held that in construing legislation, every reasonable presumption must be indulged in favor of its constitutionality. Heckler v. Conter *et al.* (1933), 206 Ind. 376, 187 N. E. 878.

"It has further been held that when the legislature declares in the Act itself that the salaries of county officials in the several counties of the state are graded according to population and necessary services required, we must assume that it had before it all the necessary information to enable it to fix such salaries

upon a just and equitable basis, with the view of giving each official therein named a reasonable compensation for the services performed. Harmon v. Board of Commissioners of Madison County (1899), 153 Ind. 68, 72, 54 N. E. 105.

"The above principle was effectively applied in the statute then before the court for construction, which fixed the salary of the Clerk of the Circuit Court and other officers therein named according to the named county. In that case, the court at great extent reviewed the purpose of the amendment to the Constitution of 1881 for the fixing of salaries according to population and services required. Said case on page 76 of the opinion makes the further pertinent observation:

> "'* * * It is only where there is a gross departure and manifest abandonment and defiance of the constitutional rules of procedure that the judicial department of the State can set aside and declare void the acts and proceedings of a coordinate branch of the State government.'

"It is clear from a reading of Official Opinion No. 94, *supra,* that the legislature, in enacting said amendment of said statute of 1949, clearly intended to include Lake County within its provisions but by virtue of an error in printing or drafting of said law, its title was not broad enough to cover the 200,000 to 400,000 population classification contained in the body of the Act.

"The intent of the constitutional provision as to classification clearly does not intend to impute a motive that a county which has increased in population more than 60,000 should have its officers' salaries reduced and that such officers be paid less than counties having a lesser population.

"By giving effect to the provisions of Section 49-1101, Burns', *supra,* the evident intent of the purpose of the constitutional provision, as well as that of the legislative intent, would be given full credence.

"In view of the foregoing and in full consideration of the number of years said statute remained unchallenged

as the law of Indiana, I feel required to hold said statute constitutional until otherwise judicially determined, and that *incumbents* in office of the county officials of Lake County, Indiana, whose salaries would be jeopardized by the change in census above indicated, would have their salaries continued in full force and effect, in the amount stated in Chapter 236 of the Acts of 1949, by virtue of the provisions of Section 49-1101, Burns' 1951 Replacement."

Again, in Official Opinion No. 34, *supra,* the question involved was whether the salaries, expenses and allowance for clerical help of the Justices of the Peace in Calumet Township should remain in *status quo* although the population had increased according to the 1950 census, thus placing the Justices of the Peace and Constables of Calumet Township in another class which provided for a lesser salary and allowance. That Opinion concluded as follows:

"1. Your first question involves consideration of the salaries above fixed for these two offices by Section 2 of Chapter 178 of the Acts of 1949, *supra,* and the allowances for rent and miscellaneous expense of the justice of the peace, as contained in Section 4 of the above quoted statute, together with the transportation expenditures of the constable provided for in Section 2 of said statute.

"Since it is necessary for the justice of the peace to provide a court room and various supplies therefor, the maximum amounts allowed for such expenses, including the transportation expenses of the constable, are so that such activities can be carried out without unduly diminishing the salaries of the two officers referred to.

"Since Section 49-1101, Burns' 1951 Replacement, *supra,* prohibits a diminution of salaries, compensation and *per diem* of public officers, including township officers, I am of the opinion the answer to your first question should be that Official Opinion No. 1 of 1952 controls and that this justice of the peace salary and allowance remain in *status quo* during his term of office. If the expenses herein referred to were not provided

for, it would itself result in a diminution of such salaries.

"2. I assume from your second question that it is directed to the maximum allowance of Section 4 of said statute of not exceeding $2,200 for clerical help. In my opinion, your second question should be answered in the affirmative for the reasons heretofore given in answer to your first question."

I should point out at this time that Acts of 1957, Ch. 322, provides a new classification for townships upon which classification is based the number of Justices of the Peace and Constables, their salaries, clerk hire, docket fees and jurisdiction. Acts of 1957 were published and circulated at 3:45 P. M., June 25, 1957, and were proclaimed by Lieutenant Governor Crawford Parker at 11:15 A. M., June 26, 1957. Therefore, in answer to your question number 2, in regard to the salary to which Justices of the Peace of Calumet Township are entitled, it is my opinion that, based upon the above-cited Opinions of this office, said Justices of the Peace were entitled to continue to receive the annual salary of $4,200.00 and also the allowance for clerk hire until the effective date of the Acts of 1957, *supra*.

Your question number 3, concerning the statute under which such Justices of the Peace will now operate, is answered above. Their salary, docket fees and other costs, clerk hire and jurisdiction are covered by the provisions of Acts of 1957, *supra*, and therefore are controlling from the effective date of that Act.

In conclusion, I will summarize my answers to all of your questions:

PART I

(1) Justice of the Peace Caesar is entitled to her salary at the rate of $4,200.00 annually pursuant to Acts of 1953, Ch. 154, Sec. 1, as found in Burns' (1955 Supp.), Section 5-108m, from the date of her appointment as said Justice of the Peace, which time would include the period after her appointment had been declared null and void by the Porter Circuit Court.

(2) The decision in Caesar v. Devault *etc., et al., supra*, decided on April 23, 1957, made payments of constables'

salaries and other office expense provided for in Acts of 1945, Ch. 223, Secs. 2 and 4, as found in Burns' (1955 Supp.), Sections 5-108c and 5-108e invalid from and after that date; however, payments made pursuant to the Acts of 1945, *supra,* and prior to April 23, 1957, are not invalid inasmuch as they do not create any liability upon either the officer making said payments or the officer or persons receiving said payments.

PART II

(1) The special census of the City of Gary of August 18, 1956, conducted by the Federal Bureau of the Census should be considered as the last preceding United States census for that City.

(2) The Justices of the Peace of Calumet Township, Lake County, are entitled to receive their salary of $4,200.00 per year after the date of the special census pursuant to the provisions of Acts of 1920 (Spec. Sess.), Ch. 28, Sec. 1, as found in Burns' (1951 Repl.), Section 49-1101, which prevents a decrease in the salary of a public official due to an increase in the population of his political subdivision. This salary continued until the effective date of Acts of 1957, Ch. 322.

(3) Said Justices of the Peace are now governed by the provisions of the Acts of 1957, *supra,* as to their salary, docket fee, clerk hire and jurisdiction.

OFFICIAL OPINION NO. 32

August 9, 1957

Mr. Howard F. Tudor
Chairman
Indiana Real Estate Commission
145 West Washington Street
Indianapolis, Indiana

Dear Mr. Tudor:

I am in receipt of your letter of July 10, 1957, in which you request an Official Opinion with regard to Acts of 1949, Ch. 44, Sec. 14 and which reads as follows: