

notice alternative to newspaper publication consisting of "two insertions, one week apart."

Therefore, in summary, and in answer to your first question, it is my opinion that the statute referred to in your question, which provides for incorporating maps and charts by reference, cannot be construed to apply to towns as well as to cities.

In answer to your second question, it is my opinion that there are no statutory provisions whereby incorporation of maps and charts by reference may be used in publication of town ordinances; therefore, such ordinances must be drafted so as to obviate the necessity for maps and charts, or else said maps and charts must be set out in full in such ordinances.

In answer to the first part of your third question, it is my opinion that a town board may meet its requirements in regard to public notice of ordinances containing penalties by posting the ordinances in one public place in each ward of the town, at least ten days before the effective date.

In answer to the second part of your third question, it is my opinion that when a town ordinance containing penalties is published, it must not be published by fewer than two insertions, one [1] week apart, but is unnecessary that duplicate publication be in two [2] different newspapers.

OFFICIAL OPINION NO. 38

September 12, 1957

The Honorable William E. Babincsak
State Representative
1856 South River Drive
Munster, Indiana

Dear Representative Babincsak:

I am in receipt of your recent letter requesting an Official Opinion on the following questions:

"1. Is there now any schedule of fees provided by law which the County Surveyor may legally charge for those services which he is bound by law to render?

OPINION 38

“2. If there is no schedule of fees provided by law, may the County Surveyor charge for his services the usual fees which are charged by the profession in the county where he is the elected and qualified County Surveyor?”

“3. May the County Surveyor, in his individual capacity, as an Engineer or Surveyor, accept contracts in his individual capacity and charge for same?”

“4. If the answer to #3 is in the affirmative, would the County Surveyor be required to turn over to the county the fees which he has earned as a private surveyor during the time that he is holding office as County Surveyor?”

“5. If there is no schedule of fees provided by the statutes, may the Court be appealed to for the purpose of fixing a proper fee for services which have been rendered for Legal Surveys?”

“6. If there are no fees which the County Surveyor in his official capacity may charge for his services, is there any lien statute which he may resort to for the purpose of collecting such fees for the county?”

“7. May the County Surveyor resort to the statute on Fee Bill for the purpose of collecting fees, if any there be, which he may legally charge for services as a County Surveyor, to be turned over to the County?”

“8. Does Chapter 172, Page 453 of the Acts of 1951 authorize the County Surveyor to charge a reasonable fee, or such fee as may be reasonable in the county in which his office is located, for services pertaining to his office, which fees are turned over to the county?”

Your letter has not specifically detailed the “services” to which you refer in question one, but examples might well be those of 1 R. S. 1852, Ch. 103, Sec. 3 and Sec. 7, as set out in Burns’ (1951 Repl.), Sections 49-3311 and 49-3308, which say, in part, as follows:

[49-3311] “Whenever the owner of any land within this state, after having given ten [10] days’ notice to the owners of adjoining lands (if such owners reside

in the county, and, if not, by publication, for three [3] weeks successively, in a newspaper nearest to such land), shall desire to establish, relocate or perpetuate, any corner thereof, or in the same section or line thereof, *such county surveyor shall proceed to make the required surveys and location. * * * The expense of said publication and survey shall be borne equally by all persons interested;* and if any of the persons thus interested are nonresidents, the surveyor shall hand over a certified statement of the amount due from them for such publication and survey to the auditor of the county, who shall enter it upon his tax duplicate against such person, and cause it to be collected in the same manner as the taxes assessed against such person.” (Our emphasis)

[49-3308] “Such surveyor, or his deputy, shall have the power to *administer all oaths* required in the discharge of his duties, for which he may receive *the usual fees.*” (Our emphasis)

Acts of 1875 (Spec. Sess.), Ch. 8, Sec. 29, as amended and found in Burns’ (1951 Repl.), Section 49-3511, as applied to Notaries Public and commissioners of deeds, provides that the fee for administering an oath shall be twenty-five cents [25¢].

Acts of 1875 (Spec. Sess.), Ch. 8, Sec. 21, repealed by Acts of 1943, Ch. 232, Sec. 1, said, in part:

“The County Surveyor’s fee shall be as follows, to-wit:

“For every corner by him located or perpetuated 1 00 (1.00)”

The 1943 repeal of the Acts of 1875 (Spec. Sess.), Ch. 8, Sec. 21, without replacement, left no schedule of fees legally charged by County Surveyors in our statutes; therefore, the answer to your first question is negative.

Public policy requires that a public officer should make no charges for performing any services in matters pertaining to or relating to his official duties.

Eley v. Miller (1893), 7 Ind. App. 529, 34 N. E. 836;

OPINION 38

Kerr v. Register (1908), 42 Ind. App. 375, 85 N. E. 790;

1939 O. A. G., page 160.

It has been held that a public officer is entitled only to such fees as are authorized by statute and, before allowance can be made, he must point out the particular statute authorizing the allowance.

Applegate v. State *ex rel.* Pettijohn (1933), 205 Ind. 122, 185 N. E. 911;

Legler v. Paine (1896), 147 Ind. 181, 45 N. E. 604;

Wood v. Board of Comrs. (1890), 125 Ind. 270, 25 N. E. 188;

City of East Chicago v. Seuberli (1941), 108 Ind. App. 581, 31 N. E. (2d) 71.

Without a fee schedule, it is necessary to consult the statutes authorizing collection of fees to determine the authorized amount. Burns' Section 49-3308, *supra*, permits the "usual fees" to be charged for administering oaths; however, there is no known "profession" so doing, it being properly the duty of divers officers.

The duty to locate corners provided in Burns' Section 49-3311, *supra*, is one that a civil engineer is, by "profession," qualified to do. However, the statute says that the "expense" of a "survey" shall be charged. As professional fees are usually computed so as to allow a profit, they would legally exceed the statutory limitation to "expense"; therefore, the answer to your second question is also negative.

The Acts of 1933, Ch. 21, Sec. 1, as found in Burns' (1951 Repl.), Section 49-1001, says, in part:

"The public officers herein named together with their deputies and other assistants *shall receive for their services the compensation provided in this act*, which compensation shall be paid monthly from the general fund of the county in the manner now provided by statute for payment of official salaries, *and they shall receive no other compensation, fees, per diem, per cent or other remuneration whatsoever* except as otherwise

provided in this act. No payments of salaries shall be made until the officer has made report of all fees collected and paid same into the treasury. *The officers' salaries* herein designated shall be paid by the respective counties, and *shall be in full for their services as such officers*, and also for all services required of them as ex officio officers of any city which they serve as such, except as herein otherwise provided.' (Our emphasis)

The above-quoted section was considered in 1936 O. A. G., page 370 at 371, wherein it was said:

"* * * this Section applies to these officers in the performance of their *official duties as officers* and does not mean that they are prohibited from accepting any other employment whatsoever." (Our emphasis)

Since the Legislature has, at various times, recognized the fact that a County Surveyor might be a civil engineer by providing increased salaries for those so qualified (See Acts 1949, Ch. 259, Sec. 1, Burns' Section 49-1051; Acts 1949, Ch. 262, Burns' Section 49-1052); and since there is no statutory prohibition against accepting employment in that capacity, the only restriction on the ability of a County Surveyor to practice his profession would lie in public policy and in the common-law principles of fiduciary duty and possible breach thereof.

The Acts of 1905, Ch. 169, Sec. 517, as found in Burns' (1956 Repl.), Section 10-3713, says, in part:

"* * * any person holding a lucrative office under the * * * laws of this state, who shall, during the time he may occupy such office * * * and discharge the duties thereof, be interested, directly or indirectly, in any contract for * * * work of any kind, erected or built for the use of the state, or any county * * * in which he exercises any official jurisdiction, or who shall bargain for or receive any * * * profit or money whatever, *on any contract * * * wherein the state or any county * * * is concerned*, on conviction, shall be fined not less than three hundred dollars [\$300] nor more than five thousand dollars [\$5,000], and be imprisoned in the state prison not less than two [2] years nor more

than fourteen [14] years, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period." (Our emphasis)

The Acts of 1905, Ch. 129, Sec. 46, as found in Burns' (1950 Repl.), Section 48-1247, has similar provisions applicable to officers of cities and towns. In Noble *et al.* v. Davison (1912), 177 Ind. 19, 28, 96 N. E. 325, the Court said:

"Even in the absence of the statute, the contract would, as appellee maintains, be void, because contrary to public policy. * * * This court has ever steadfastly adhered to the rule which invalidates all agreements injurious to the public, or against the public good, or which have a tendency to injure the public. Contracts belonging to this class are held void, even though no injury results. *The test* of the validity of such agreements *is the tendency to public injury*, regardless of the actual intent of the parties, and regardless of actual results.

* * *

"Integrity in the discharge of official duty is zealously guarded by the law. It lends no aid to that which tends to corrupt or contaminate official action, whether such action be judicial, legislative or administrative. 9 Cyc. 485. And the tendency of contracts between municipal corporations and officers thereof, for municipal improvements or supplies, is to mislead the judgments of the officers of the municipality, if not to sully their purity." (Our emphasis)

While extremely liberal interpretation of the language emphasized in Burns' Section 10-3713, *supra*, to-wit: "any contract * * * wherein * * * any county * * * is concerned" would be needed to include contracts by a County Surveyor to do legal surveys for persons in his county in his individual capacity as a civil engineer provided that such surveys were of substantially the same kind and nature as required of the County Surveyor by Section 49-3311 of Burns, *supra*, the foregoing citations are expressive of public policy, both by statute and by judicial dicta.

46 C. J. Officers § 308, page 1037, says:

“* * * officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public.
* * *”

It was said in *Bullock v. Robison* (1911), 176 Ind. 198, 207, 93 N. E. 998:

“* * * It is unnecessary to say that no man can render faithful service to two masters in a matter where their interests conflict.

* * *

“Aside from statutory enactments, at common law, a public officer was not permitted to exercise discretionary power in a matter in which he was personally interested.”

In *Stropes v. Greene County* (1880), 72 Ind. 42, 43, it was said:

“There is neither a more wholesome nor a sounder rule of law than that which requires public officers to keep themselves in such a position as that nothing shall tempt them to swerve from the straight line of official duty. Officers ought not to be permitted to place themselves in a position, in which personal interest may come into conflict with the duty which they owe to the public.”

There could clearly be no conflict with official duty if a County Surveyor who is also a registered engineer or surveyor, were to contract to do legal surveys in counties outside of the one where he is the duly elected County Surveyor, provided that the performance of such contract did not interfere with his official duties as County Surveyor. With respect to legal surveys in his own county carried on in his private capacity, the right to do so would be dependent upon such not interfering with the discharge of his official duties and not being of the same nature as official duties imposed by statute upon him as County Surveyor.

Within the above limits, expressed and implied, a County Surveyor is permitted to accept contracts as an individual and

to assess charges; therefore, the answer to your third question is in the affirmative.

The Acts of 1933, Ch. 21, Sec. 5, as found in Burns' (1951 Repl.), Section 49-1005, says, in part:

"The compensation provided in the foregoing section shall be in lieu of all salaries, fees, and per diem now provided by statute for the officials therein designated, their deputies and other assistants in the several counties of the State of Indiana, except as herein otherwise provided. *All fees and remuneration of whatsoever kind or character, for official services or involving official authority, now provided by statute or otherwise, shall be charged and collected by such officers and shall be the property of the county and shall be covered into the general fund of the county except as herein otherwise provided * * *.*" (Our emphasis)

If a County Surveyor earns fees as a private surveyor, according to the discussion in answer to your third question, the work must necessarily have no connection with "official services" or "official authority" of a County Surveyor or else he would not be free to earn them.

Only those fees "for official services or involving official authority" are required to be paid into the County General Fund by Burns' Section 49-1005, *supra*. The Acts of 1957, Ch. 319, will be effective after January 1, 1958. Sections 3 and 16 thereof, as found in Burns' (1957 Supp.), Sections 49-1055 and 49-1068, are similar to Burns' Section 49-1005, *supra*, and say, in part:

"The annual salaries fixed by this act shall be in full for all services and in lieu of all fees * * * and any and all other remuneration whatsoever *for official services or involving official authority* except as herein otherwise provided." (Our emphasis)

"It is the intent of this act that all fees * * * and all other remuneration of whatever kind or character now received by all officers included in this act *for official services, or involving official authority*, except as herein otherwise provided, shall be collected, ac-

counted for and paid into the County General Fund
* * *.” (Our emphasis)

Therefore, the fourth answer is also negative, both now and after January 1, 1958.

Acts of 1879 (Spec. Sess.), Ch. 51, Sec. 36, as found in Burns' (1951 Repl.), Section 49-1432 says:

“Any officer being in doubt of the proper charge to be made for any service rendered, shall in no case charge any constructive fee, but he shall bring the question before the circuit judge of his county, in writing, and said judge shall decide the same, which decision shall be entered of record as other orders of court are entered. A note thereof, showing the page of the order book, shall be entered in the list of fees kept in the office of such officer, which order shall authorize such charge to be made as found by the court. For such submission, proceedings and orders, the officer, shall make no charge, and shall have no fees therefor.”

The title to the above-cited Acts of 1879 (Spec. Sess.), Ch. 51, is:

“AN ACT fixing certain *fees to be taxed in the offices*, and the salaries of officers *therein named*; providing for certain employees in certain public offices, and fixing their compensation; *defining certain duties and liabilities of officers* and persons *therein named*; providing for the disposition of certain moneys; making certain appropriations; declaring certain violations of the provisions of this act to be a penal offense, and prescribing the punishment, and repealing all conflicting laws.” (Our emphasis)

The requirement of the Indiana Constitution, Art. 4, Sec. 19, that an “act shall be void * * * as to so much thereof as shall not be expressed in the title” is too well established to require documentation here.

While Burns' Section 49-1432, *supra*, fails to specify applicable officers, the title of the Acts of 1879 (Spec. Sess.), Ch. 51, limits application to officers named “therein.” Omission of a County Surveyor by name from this Act effectively excludes

OPINION 38

him from coverage under Sec. 36, Burns' Section 49-1432, *supra*, despite the fact that the Acts of 1879 (Spec. Sess.), Ch. 51, covers much of the same subject-matter as the Acts of 1875 (Spec. Sess.), Ch. 8 (Sec. 21 of which was the County Surveyor's Fee Schedule previously referred to).

The Uniform Declaratory Judgments Act, Acts of 1927, Ch. 81, Secs. 1 and 2, as found in Burns' (1946 Repl.), Sections 3-1101 and 3-1102, say, in part:

"Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. * * *"

"Any person * * * whose rights, status or other *legal relations are affected by a statute*, municipal ordinance, contract or franchise, may have determined any question or construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." (Our emphasis)

Lambert v. Smith (1939), 216 Ind. 226, 23 N. E. (2d) 430, held that this Act must be given the broadest possible interpretation; therefore, it is my opinion that the County Surveyor could bring an action for a declaratory judgment to construe the provisions of Burns' Section 49-3311, *supra*; however, a court might find it possible to "declare the rights, status or other legal relations thereunder" without formulating a fee schedule in the process. Within the limitations of the Declaratory Judgment Act, my answer to your fifth question is affirmative.

While a County Surveyor may charge the "usual fee" for acknowledging oaths and "the expense" of publication and survey, Section 49-1311, *supra*, expressly provides for entering the latter amount upon the tax duplicates of nonresidents only. That section makes no provision for collection from resident landowners. It will be found that the answer to your sixth question is covered in the discussion specifically answering your seventh question, here following.

The title of the Acts of 1875 (Spec. Sess.), Ch. 8 is:

“AN ACT fixing the fees, salaries, *duties* and compensation of *the officers and persons named therein*, prohibiting the violation of its provisions, and repealing certain laws.” (Our emphasis)

It is to be remembered that Section 21 thereof was the County Surveyor's Fee Schedule repealed by the Acts of 1943. Nevertheless, certain other sections of the Acts of 1875 (Spec. Sess.), Ch. 8, continue in force, with the same coverage as originally enacted so that Sections 39 to 43 thereof (Burns' Sections 49-1423 to 49-1426) would continue to apply to County Surveyors. Section 42 as set out in Burns' Section 49-1425 says, in part:

“Every fee-bill shall be made out in words and figures, at full length, with a statement of each item in plain phraseology. Each officer may, at the foot of any of his fee-bills, make out a mandate to the proper officer, commanding him to collect the same as required by law, and make due return thereof, and shall sign the same; and from the time such fee-bill shall come into the hands of such collecting officer, it shall have the force and effect of an execution from the circuit court, and shall be treated as such, and *shall operate as a lien upon the real and personal estate of the debtor * * **” (Our emphasis)

Therefore, the answers to your sixth and seventh questions are affirmative. The Acts of 1875 (Spec. Sess.), Ch. 8, permits a County Surveyor to issue fee-bills which operate as liens.

The Acts of 1951, Ch. 172, is amendatory of the Acts of 1949, Ch. 259 and is of special application to counties having a population between 250,000 and 400,000. Section 1, as in Burns' (1957 Supp.), Section 49-1051, provides for a salary to the County Surveyor “in lieu of all fees.” Section 2, as found in Burns' (1957 Supp.), Section 49-1051a says:

“All fees already charged now and to be charged by the county surveyor for services connected with the office shall be charged and collected, and paid into the general fund of the county.”

OPINION 38

As is stated in answer to your second question, one must refer to the statute authorizing collection of fees to determine the authorized amount.

Burns' Sections 49-1051 and 49-1051a, *supra*, are analagous to the Acts of 1933, Ch. 21 as set out in Burns' Sections 49-1001, *supra*, and 49-1005, *supra*. It is my opinion that the Acts of 1951, Ch. 172, merely refers to disposition of fees "already charged" or "to be charged" and is not authority for charging any fees, reasonable or otherwise.

Therefore, in conclusion, it is my opinion that:

The answer to your first question is that there is not now any statutory schedule of fees legally charged by a County Surveyor for those services which he is bound to render by 1 R. S. 1852, Ch. 103, Sec. 3, as set out in Burns' Section 49-1311, *supra*; however, the "usual fees" which a County Surveyor is authorized to charge for acknowledging oaths are those provided in Acts of 1875 (Spec. Sess.), Ch. 8, Sec. 29, as found in Burns' (1951 Repl.), Section 49-3511.

In answer to your second question, a County Surveyor may not charge for legal surveys the "usual fees" charged by professional engineers and surveyors.

In answer to your third question, a County Surveyor may, if he is a registered engineer or surveyor, accept contracts in his individual capacity and charge for his services, provided that there is no breach of or conflict with official duty, or violation of public policy statutes.

In answer to your fourth question, a County Surveyor would not be required to turn over to the county fees which he earns as a private surveyor during his tenure as County Surveyor.

In answer to your fifth question, a County Surveyor could request of a court of record a declaratory judgment of proper fees to be charged for surveys rendered pursuant to Burns' Section 49-3311, *supra*.

In answer to your sixth and seventh questions, a County Surveyor may issue fee-bills which operate as liens according to Burns' Section 49-1425, *supra*.

In answer to your eighth question, it is my opinion that Acts of 1951, Ch. 172, does not authorize a County Surveyor to charge "reasonable" fees for services pertaining to his office.