

OPINION 92

From the foregoing, I am of the opinion that a teacher, a member of the Teachers' Retirement Fund, who is under contract to teach for the succeeding school year and who sustains an injury resulting in disability prior to the start of the school year, is entitled to disability benefits under the provisions of the statutes governing said fund providing said teacher has ten (10) or more years of service credits under the provisions of said act.

OFFICIAL OPINION NO. 92

October 15, 1953.

Mr. Frank A. Jessup, Supt.,
Indiana State Police,
Stout Field,
Indianapolis 21, Indiana.

Dear Mr. Jessup:

This is in reply to your letter of August 20, 1953 in which you inquired as to the following with reference to Chapter 183 of the Acts of the General Assembly of 1953:

"1. Does the main law mean that persons operating a motor vehicle which is overweight less than 1,000 pounds are guilty of a misdemeanor and subject to the \$5.00 fine and costs provided in the act?

"2. Is it constitutional for the legislature of the State of Indiana to provide for the assessment of a civil penalty in a criminal action?

"3. What should be the form of judgment?

"4. How can the judgment be collected?

"5. When the defendant has paid his fine, what action is pending?"

Your questions relate to Sections 8 and 8A of the Acts of the General Assembly of 1931, Chapter 83, as amended by Chapter 183 of the Acts of the General Assembly of 1953, as found in Burns' Indiana Statutes Annotated (1952 Repl., 1953 Supp.), Sections 47-536, 47-536a which read in part as follows:

"Sec. 8. (a) *It shall be unlawful to operate or to cause to be operated any vehicle or combination of vehicles having a weight in excess of one (1) or more of the following limitations:*

"(1) The total gross weight, with load, in pounds of any vehicle or combination of vehicles shall not exceed seventy-two thousand (72,000) pounds."

(Several other maximum weight provisions, definitions and highways use provisions follow, in this same section.)

"Sec. 8A. Any person who operates or causes to be operated any vehicle or combination of vehicles having a weight in *excess of one (1) or more of the limitations set out in section 8 (Sec. 47-536) shall be guilty of a misdemeanor and on conviction shall be fined in the sum of five dollars (\$5), and shall in addition be assessed the following civil penalties:*

"(1) If the total of all excesses of weight under one (1) or more of the limitations in section 8 is less than 1,000 pounds, *no penalty.*

"(2) If the total of all excesses of weight under one or more of the limitations in section 8 is less than 2,000 pounds and more than 1,000 pounds, two cents (2¢) a pound for each pound over 1,000 pounds.

* * *

"All civil penalties so assessed shall be collected and deposited to the credit of the motor vehicle highway account. In the event any civil penalty is not paid the prosecuting attorney of the judicial circuit in which the action is pending is authorized to bring an action in the name of the state of Indiana to enforce the collection of the same."

Prior to the 1953 amendment to Sec. 8A, *supra*, it read in part:

"Any person who operates or causes to be operated any vehicle or combination of vehicles having a weight in excess of one (1) or more of the limitations set out

OPINION 92

in section 8 (§ 47-536) shall be guilty of a misdemeanor and on conviction shall be fined as follows:

“(1) If the total of all excesses of weight under one (1) or more of the limitations in section 8 is less than 1,000 pounds, no fine.

“(2) If the total of all excesses of weight under one (1) or more of the limitations in section 8 is less than 2,000 pounds and more than 1,000 pounds, two cents (2¢) a pound for each pound over 1,000 pounds.”

It is evident that the 1953 amendment changed the application of it to provide that to operate any vehicle or combination of vehicles which is overweight in respect to the maximum limitations set forth in that section would be “unlawful” and that any person who so operates any vehicle or combination of vehicles which is overweight in respect to the maximum limitations set forth in Section 8 “shall be guilty of a misdemeanor and on conviction shall be fined in the sum of five dollars (\$5)
* * *”

The first paragraph of Section 47-536a provides two forms of punishment for the unlawful act: The first being a fine in the amount of five dollars (\$5), and the second being a civil penalty. The next succeeding paragraph, numbered (1), specifically eliminates the penalty, in those cases where the amount of excess weight is less than 1,000 pounds, but does not eliminate the fine.

Therefore your first question must be answered in the affirmative. Even though the excess weight is less than 1,000 pounds, if the weight exceeds the maximum weight provided in Section 47-536, *supra*, “the operator of the vehicle or combination of vehicles * * * shall be guilty of a misdemeanor and on conviction shall be fined in the sum of five dollars (\$5)
* * *”

In respect to your second question, in our opinion no provision of either the Constitution of Indiana or the Constitution of the United States prohibits the assessment of a “civil penalty” in a criminal action. The power of the legislature to prescribe the form of the remedy is plenary. *Durham v. The State ex rel. Anderson, Prosecuting Attorney* (1888), 117 Ind. 477, 19 N. E. 327.

A good example of the extent to which the legislature may go in providing the form of the remedy to enforce a statutory penalty is Chapter CC, p. 360, of the Acts of 1889, which provided for the filing of a complaint, in the name of the State of Indiana, on relation of any person hired, bought, or induced by the defendant to vote or refrain from voting. Upon the filing of such a complaint, the clerk was required to issue a warrant for the arrest of the defendant, who could be admitted to bail upon entering into a bond payable to the State of Indiana in the penal sum of one thousand dollars. In default of bail, the defendant was to be committed to jail. If the finding of the court on trial of the cause was for the plaintiff, "The State shall recover judgment against the defendant in the sum of three hundred dollars for the use and benefit of the relator, a reasonable fee for his attorney in said prosecution, and all costs; and the Court shall require of such defendant, if he be in custody, to replevy such judgment by good freehold surety, the length of stay to be six months from the date of the judgment, or in default thereof, shall commit such defendant to jail to remain until discharged by law."

In the case of *The State ex rel. Beedle v. Schoonover* (1893), 135 Ind. 526, 35 N. E. 110, the above statute was declared constitutional, and the Supreme Court specifically held that the liability of the defendant in such case was a *civil penalty* for a tortious act, and not a debt.

A sum of money which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by a civil action, even if it may also be recovered in a proceeding which is technically criminal, unless the statute by which the penalty is imposed contemplates recovery only by a criminal proceeding. *Hepner v. United States* (1909), 213 U. S. 103, 29 S. Ct. 474, 53 L. Ed. 720. See also *United States v. Zucker* (1896), 161 U. S. 475, 16 S. Ct. 641, 41 L. Ed. 777, and *City of Hudson v. Granger* (1898), 23 Misc. 401, 52 N. Y. S. 9, 10.

Penalties are punitive in their nature, and ordinarily constitute exactions imposed in the enforcing of the criminal laws and police regulations of the state and its governmental subdivisions. *School District of the City of Omaha v. Adams* (1946), 147 Neb. 1060, 26 N. W. (2d) 24. A penalty imposed

for criminal misconduct is none the less punitive by reason of the fact that it may be enforced by a proceeding civil in form. *La-Franca v. U. S.* (1930, 5 Cir.), 37 F. (2d) 269, 270. See also *City of Ft. Wayne v. Bishop* (1949), 228 Ind. 304, 310, 92 N. E. (2d) 544.

The adjective "civil" as used to modify the word "penalties" in Section 47-536a does not refer to the enforcement of a private as distinguished from a public right, and does not refer to damages for the commission of a tort as distinguished from punishment for the commission of a crime, since by the terms of the statute the assessment of the "civil penalties" follows the *conviction* of the person charged with a misdemeanor; and therefore this adjective, reasonably construed, has reference only to the method of collection of the penalties so assessed. Although such penalties constitute pecuniary punishment for the breach of a criminal law, the legislature did not intend that they should be collected as fines are collected, and the defendant is not subject to imprisonment for failure to pay such penalties.

In answer to your third question, regarding the form of the judgment, the judgment should be generally as follows:

"IT IS THEREFORE ORDERED AND ADJUDGED by the Court that the defendant for the offense by him committed, be, and hereby is, fined in the sum of five dollars, and that he pay and satisfy the costs herein; and in addition that said defendant be, and hereby is, assessed the following civil penalty, to-wit: \$....."

Of course the finding of the court should be broad enough to support the judgment, showing the number of excess pounds upon which the court figured the penalty.

The fine and costs may be collected in the usual manner, and the defendant may be imprisoned for failure to pay or replevy the same and the vehicle or combination of vehicles involved shall be kept impounded until all fines and costs levied on the basis of the excess weight are paid or stayed. If the defendant does not pay the civil penalty assessed, then by the specific terms of Section 47-536a, *supra*, the prosecuting attorney is authorized to bring an action in the name of the State of In-

diana to enforce the collection of the same. Since the conviction of the person charged is a condition precedent to the assessment of the civil penalty, and his liability has already been fixed and determined, the civil action is in the nature of a suit on a judgment, which should be pleaded. A suit to collect a statutory penalty is not ordinarily in the nature of a suit on a judgment.

23 Am. Jur., page 659, Section 73, "Forfeitures and Penalties." But the language of Section 47-536a, *supra*, on this point seems clear and without ambiguity.

Your last question arises from that part of the statute which provides that "*the prosecuting attorney of the judicial circuit in which the action is pending*" is the party authorized to bring the action to collect the civil penalty. It is evident that this provision relates to the judicial circuit in which the judgment was rendered and where the penalty remains unpaid. The intent of the legislature in this provision was to designate the particular prosecuting attorney, rather than the time of filing the action to collect the penalty. The statute does not require that the criminal action be pending at the time the civil action is filed.

It is therefore my opinion :

1. In answer to your specific question number 1 the main law as found in Section 47-536a, *supra*, means that persons operating a motor vehicle which is overweight less than 1,000 pounds are guilty of a misdemeanor and are subject to the five dollar (\$5) fine and costs as provided in the act.

2. It is constitutional for the legislature of the state of Indiana to provide for the assessment of a civil penalty in a criminal action.

3. The form of judgment should be :

"IT IS THEREFORE ORDERED AND ADJUDGED by the Court that the defendant for the offense by him committed, be, and hereby is, fined in the sum of five dollars, and that he pay and satisfy the costs herein; and in addition that said defendant be, and hereby is, assessed the following civil penalty, to-wit: \$....."

OPINION 93

4. The fine may be collected in the usual manner as provided for in the payment of all fines and costs and the civil penalties may be collected in a civil action filed by the prosecuting attorney on behalf of the State of Indiana.

5. In answer to your fifth question concerning the statutory provision in regard to the words "action is pending," the intent of the legislature was to designate the particular prosecuting attorney, rather than the time of filing the action to collect the penalty. The statute does not require that the criminal action be pending at the time the civil action is filed.

OFFICIAL OPINION NO. 93

October 19, 1953.

Hon. Crawford Parker,
Secretary of State,
201 State House,
Indianapolis, Indiana.

Dear Mr. Parker:

I have your request for an Official Opinion in which you ask:

"Does Notre Dame have the requisite power and authority under its charter from the Indiana General Assembly to organize a wholly owned profit making subsidiary under the Indiana General Corporation Act of 1929, as amended?"

We assume that your question seeks information as to whether Notre Dame, as a corporation, may act as an incorporator.

A corporation is a legal fiction, an artificial entity, recognized by law and formed by procedure prescribed by law. It is not a natural person.

Tucker v. Binstock (1933), 310 Pa. 254, 165 A. 247;

Paul v. University Motor Sales Co. (1938), 283 Mich. 587, 287 N. W. 714.