

OPINION 18

I am therefore of the opinion that Section 28-3701, Burns' 1948 Repl., does not supersede or control Section 28-4909, Burns' 1948 Repl.

The last referred to statute is clear and unambiguous and therefore not subject to construction.

Section 4502, Sutherland Statutory Construction,
Third Edition;

Citizens T. & S. Bank v. Fletcher American Company
(1934), 207 Ind. 328, 334, 190 N. E. (2d) 868;

1945 Ind. O. A. G., p. 372, Official Opinion No. 92.

Under the clear provisions of Section 28-4909, Burns' 1952 Repl., I am therefore of the opinion your question should be answered as follows:

1. The township trustee of the transferring school corporation cannot designate or select the approved school to which a transfer for vocational education is made.

2. The trustee of the resident school corporation of an applicant for a transfer for vocational education does not pass on such consideration, nor does the county superintendent of schools, nor can they force a substitute choice of schools. The application is made by the parents of the child, and the child, to the State Department of Education who must either approve or disapprove such application for transfer to the particular school designated. It may not substitute the school. It must also fix the tuition fee to be paid to the receiving school from the school corporation where such applicant resides.

OFFICIAL OPINION NO. 18

April 6, 1953.

Hon. John W. Van Ness,
Senator,
603 Franklin Street,
Valparaiso, Indiana.

Dear Senator:

I have your request for an official opinion in which you ask the following three questions:

"1. In the event of the death of a legislator during his term of office, how is the vacancy filled?

"2. What is the status of the legislator's salary? Is any unpaid portion due his estate, or heirs?

"3. Would any expense allowance be continued after the legislator's death?"

In answer to your first question, section 19 of article 5 of the Indiana Constitution concerning the duties of the Executive provides as follows:

"Election to vacancies in assembly.—He shall issue writs of election to fill such vacancies as may have occurred in the General Assembly."

I find no other constitutional provision concerning the election or appointment to fill vacancies in the office of Senator or Representative, however, the constitutional provision heretofore cited, is supplemented by section 178 through 180 of ch. 208 of the Acts of 1945 which are found in Burns' Ind. Statutes Anno., 1949 Repl., sections 29-4601 through 29-4603 provide that special elections shall be held when a vacancy occurs in the office of a State Senator when the legislature will be in session after the occurrence of the vacancy and before a general election. These sections also provide for the governor's issuing a writ to cause such election to be had and they provide the procedure under which elections are to be held. Thus, it is my opinion, that if a vacancy in the legislature is filled at all it will be filled by election.

In answer to your second question, chapter 177 of the Acts of 1943 which is found in Burns' Ind. Statutes Anno., 1949 Repl., section 34-201a, *et seq.*, provides that members of the General Assembly shall receive salaries of twelve hundred dollars (\$1200) annually. In chapter 2 of the Acts of 1947 which is found in Burns' Ind. Statutes Anno., 1949 Repl., section 34-201b provides how payments of such salaries shall be made. In the case of State *ex rel.* Black *et al.* v. Burch (1948), 226 Ind. 445, 80 N. E. (2d) 850, 851, the Supreme Court of Indiana had before it the effect of a resignation of a legislator during his term of office. In that case it was said:

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“(2) Although said appellant resigned, as above indicated, still, in the light of all the stipulated facts, he is not entitled to judgment mandating the appellee to issue to him a warrant in the amount demanded. Having accepted his salary as a member of the General Assembly, and, by virtue of our statute, for a period far in advance of the date of his resignation from that body, equity and good conscience should require that he return to the State the amount which he was paid for the time beyond his voluntary resignation—this he has not done or offered to do. Had this excess not been paid to him in advance, he could not have recovered same. 43 Am. Jur. Public Officers section 381.”

The session of the legislature which recently adjourned passed an act which has become chapter 102 of the Acts of this year. This Act amended existing statute having to do with the compensation of members of the legislature. Sections 1 and 2 of this act read as follows:

“SECTION 1. The above entitled act is amended by adding a new and additional section thereto to be numbered section 3 and to read as follows: Sec. 3. In the event of the death or resignation of any member of the General Assembly between periods of payments herein, the compensation already received shall be considered payment in full, up to and including the date of death or resignation. And no claim shall be made by the State of Indiana for any refund of payments herein, by reason of the death or resignation of any member of the General Assembly for the period of time until the next payment due under this act.”

“SEC. 2. The above entitled act is amended by adding a new and additional section thereto to be numbered section 4 and to read as follows: Sec. 4. Any payments heretofore made for compensation as provided by section 3, Chapter 177 of the Acts of 1943, under the terms of section 1, Chapter 2 of the Acts of 1947, are hereby legalized. And no claim shall be made by the State of Indiana for the return of any moneys paid thereunder, by reason of the death or resignation of any member of the General Assembly.”

The digest of this bill explains that its purpose was to clarify existing provisions for compensation for members of the General Assembly and to prevent the requirement that unearned salary be returned to the State. On the basis of these authorities, it is my opinion that any salary which was unearned and unpaid at the time of the legislator's death cannot be paid to his estate or his heirs.

Your third question considers certain expense allowance of legislators. House Enrolled Act No. 13 of the 88th regular session of the General Assembly which has become Chapter 2 of the Acts of this year provides in part as follows :

"It shall be the duty of the auditor of state to issue his warrant upon the treasurer of state for the expenses of each of the senators and representatives at the rate of ten dollars per day for each day of said General Assembly."

Section 29 of Article IV of the Indiana Constitution specifically prohibits any increase in compensation for members of the legislature during the session at which the increase is made. Thus, to be valid, the above quoted excerpt must be construed to allow reimbursement for actual expenditures only and inasmuch as a legislator could not incur additional expenses in the discharge of his duties after his death it would be improper to pay any expense allowance for a period of time elapsing after the death of the member of the legislature.

OFFICIAL OPINION NO. 19

April 14, 1953.

Hon. Wilbur Young,
State Superintendent of Public Instruction,
227 State House,
Indianapolis, Indiana.

Dear Sir:

Your letter has been received in which you request an official opinion on the following question :

"School people generally have believed that School Trustees, and by delegation of Trustees school admin-